

Respect for the Law Is No Excuse: Drug Addiction History & Public Safety Officer Qualifications . . . Are Public Employers Breaking the Law?

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Employers of public safety officers are justifiably concerned with both the character of individuals they hire and the public's perception of law enforcement agencies. To address these concerns, many state and local regulations require (or permit) a public employer to disqualify an applicant if he or she has a history of drug addiction. Few disqualified applicants have challenged the legality of these "no drug history" qualifications. In an effort to encourage such challenges, this Note explores the possible statutory and constitutional theories on which a rehabilitated applicant can rely to gain access to public safety officer positions. Challenges to the current blanket exclusion standards are necessary in light of both the language and policy of the disability discrimination statutes, which mandate that individualized determinations take the place of generalizations and stereotypes.

The Supreme Court has yet to address this issue, and lower courts have reached inconsistent conclusions on analogous facts. Because of the strength of arguments that a rehabilitated individual could make as well as changing societal attitudes about one's private life, this Note contends that public employers should discontinue using drug addiction history as a per se disqualification for public safety officers in order to safeguard against inevitable liability.

*"Man is a history-making creature, who can neither repeat his past
nor leave it behind."¹*

I. INTRODUCTION

Surprisingly, courts and commentators have infrequently discussed how an individual's history of drug² addiction may affect his or her ability to obtain employment as a police officer, firefighter, or other public safety officer.³

¹ W.H. AUDEN, *Two Bestiaries: D.H. Lawrence*, in *THE DYER'S HAND, AND OTHER ESSAYS* 278 (1962).

² Throughout this Note, the term "drug" is used to denote any controlled substance under the Controlled Substances Act, 21 U.S.C. § 812 (1994), especially those drugs whose use, possession, or distribution is prohibited under the Act. This definition is used under both the Americans with Disabilities Act, 42 U.S.C. § 12111(6) (1994), and the Rehabilitation Act of 1973, 29 U.S.C.A. § 705(10)(A), (B) (1999). This Note does not address alcohol addiction.

³ The term "public safety officer" is used in this Note according to the definition provided

Perhaps it is simply assumed that in positions such as these, employers deserve wide latitude in selecting individuals with the highest integrity.⁴ Even so, public employers must comply with the Americans with Disabilities Act of 1990 (ADA) and the Rehabilitation Act of 1973, which explicitly protect those individuals who have been rehabilitated from employment discrimination.⁵ Additionally, Title VII⁶ and the Fourteenth Amendment⁷ may provide protection to applicants in these situations.

An employer, of course, is not compelled to hire an individual if the applicant is not qualified for the position in question.⁸ Therefore, many state and municipal civil service regulations assume that the absence of past drug addiction⁹ is such a qualification for public safety officer positions.¹⁰ These employers often disqualify an applicant when, based on the applicant's own admission or background check, it is revealed that the applicant previously used

in the Rehabilitation Act, 29 U.S.C. § 706(12) (1994) (including those involved in the enforcement of criminal laws; those having contact with criminal defendants, suspects, prisoners, probationers, or parolees; and those engaged in firefighting, fire prevention, or emergency rescue missions) It should be noted that the Rehabilitation Act was amended in August 1998, *see* Pub. L. No. 105-220, 112 Stat. 1093, and this definition no longer appears in the Act.

⁴ A recent opinion poll, for example, found that 61% of those surveyed felt that individuals with histories of drug abuse should never be eligible for employment in certain safety-sensitive positions. *See* Institute for a Drug-Free Workplace Gallup Survey (visited Feb. 2, 1998) <<http://www.drugfreeworkplace.org/survey/page47.html>>.

⁵ *See* 42 U.S.C. § 12112 (1994); 29 U.S.C. § 791(g) (1994); *infra* Part V.

⁶ 42 U.S.C. §§ 2000e-2000e-15 (1994).

⁷ U.S. CONST. amend. XIV, § 1.

⁸ *See* 42 U.S.C. § 12112(a) (1994); 29 U.S.C.A. § 705(20)(C)(ii)(I) (1999); *infra* Part V.

⁹ It is important to note that the terms "drug addiction" and "drug abuse" are used interchangeably in this Note. Both terms are used to denote a condition that would rise to the level of a "disability" for purposes of the ADA and Rehabilitation Act. *See infra* Part III.D. The terms used in civil rights statutes, regulations, legislative history, and other sources may cause some confusion and are therefore often used interchangeably. *See, e.g.,* *Burka v. New York City Transit Auth.*, 680 F. Supp. 590, 600 n.18 (S.D.N.Y. 1988) (noting that "[t]o the extent that there is a distinction between the terms, our holding today renders it a distinction without a difference" because any drug user who seeks treatment for the problem admits a "loss of control" which makes the drug problem rise to a level that deserves protections under the statute); *cf.* Richard H. Blum, *Mind-Altering Drugs and Dangerous Behavior*, in *DEVIANCE* 280 (Simon Dinitz et al. eds., 1969) (noting the "sophistry of distinction" made between the terms, the author writes: "The critical point for us is the realization that [drug] 'use,' 'abuse,' and 'risk' are emotionally charged terms that may be based on hidden determinants or open assumptions that cannot be shown to have a factual basis.").

¹⁰ *See, e.g.,* ARIZ. ADMIN. CODE R13-4-105(A)(15) (1997) ("The person shall never have illegally used dangerous drugs or narcotics other than for experimentation."); *see also infra* Part III.C.

illegal drugs.¹¹ The disqualification can even occur without regard to how many years have lapsed since the applicant's last use of drugs.¹² For example, Lieutenant John Haas, director of personnel for the Arlington County (Virginia) Police Department stated, "We do not accept any police candidate who has used hard drugs, such as cocaine, heroin and PCP—even once . . . It's a complete disqualification factor."¹³

With the proliferation of claims under the ADA in the last few years, it is shocking to discover that few individuals¹⁴ who have overcome drug addiction and sought public safety officer positions have successfully challenged character qualifications prefaced on the past addiction to illegal drugs. Justifications for using an applicant's addiction history as a job qualification may appear rational, but are directly contrary to the purposes of civil rights statutes. This dichotomy

¹¹ Although the discussion in this Note is limited to applicants for public safety officer positions, there are also a number of private jobs that are so safety-sensitive (such as certain jobs at nuclear power plants, oil refineries, etc.) that, if an applicant's background check revealed a history of drug abuse, the individual would most likely not be given further consideration. This Note does not express an opinion on the propriety of drug abuse history qualifications in these situations (although some of the same issues would arise). For a discussion of that topic, see Jon Cheney, Comment, *EEOC v. Exxon Corp.: Will Exxon's Blanket Exclusion of Former Substance Abusers Hold Up Under the ADA?*, 48 BAYLOR L. REV. 549 (1996). Discussing the legality of Exxon's policy of excluding all former drug abusers from employment in safety-sensitive positions (adopted after the Exxon Valdez disaster), the author concludes that blanket exclusions should be permitted in certain situations and that the ADA's preference for individualized determinations should give way to other public policy considerations. See *id.* at 569–73. It should be noted that the conclusion in that Comment is different than the one reached later in this Note.

¹² See, e.g., FLA. ADMIN. CODE ANN. r. 11B-27.0011(2) (1997) ("The unlawful use of any of the controlled substances . . . by an applicant for certification, employment, or appointment, at any time proximate to such application . . . conclusively establishes that the applicant is not of good moral character as required by [Florida statutes].") (emphasis added); see also *infra* Part III.C.

¹³ Arlo Wagner, *Keeping Users Off Force: Police Urge State to be Strict on Recruits' Pasts*, WASH. TIMES, Jan. 24, 1997, at C9 (quoting Lt. Haas).

¹⁴ Understanding the importance of terminology, I have tried to use the "people first" approach to the language in this Note. Such an approach puts the "personhood identifier" (such as individual, person, people) before the explanation of their "differentness," see JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 184, 186–89, 197–201 (1993), creating the phrases used in this Note: "individual who has overcome drug addiction" or "individual who has been rehabilitated." Although more words are used this way, and it may sound awkward at times, I feel it is important to use language this way because "[a]n individual is not exclusively any one of the things he has or the things he does. . . . He is, above all, a person." HARRY SANDS & FRANCES C. MINTERS, THE EPILEPSY FACT BOOK 49 (1977). For an excellent discussion of this issue, see ROBERT L. BURGDORF, JR., DISABILITY DISCRIMINATION IN EMPLOYMENT LAW 15–23 (1995).

raises interesting questions: Are individuals with histories of drug addiction protected when municipalities discriminate against them because of events that took place years ago? On the other hand, what would be the effects if municipalities were required by law to hire police officers and firefighters whose backgrounds reveal extensive drug usage? Would the community at large regard individuals with histories of drug addiction unfit for the high calling of civil service?

In an attempt to answer these questions, this Note focuses on the legality of using an individual's drug addiction history as a qualification for public safety officer employment and argues that, regardless of one's personal views on the subject, the current state of the law prohibits public employers¹⁵ from using drug abuse history to disqualify a rehabilitated individual from public safety officer positions. Part III explains the medical recognition of drug addiction as a disease, regulations relied on by public employers to exclude individuals with histories of drug addiction from public safety officer positions, and the congressional treatment of drug addiction as a disability. Parts IV and V discuss the laws protecting individuals who have been rehabilitated from drug addiction. Part VI explores the justifications for drug addiction history disqualifications and, using principles from case law, illustrates the risk involved in maintaining such policies. This Note concludes with a recommendation for public employers that serves the same purposes of drug addiction history qualifications, but offers less risk of liability. Before further discussion, however, a scenario based on an actual case¹⁶ is necessary to illustrate the issues addressed in this Note and provide a context for analysis.

II. THE SCENARIO

John admits to regularly abusing illegal drugs while serving in the military ten years ago.¹⁷ Although never professionally diagnosed as an "addict," the

¹⁵ The term "public employers" is used in this Note to mean any entity that hires public safety officers. This definition could include state governments, municipalities, etc. This Note does not specifically address the federal government.

¹⁶ The actual case on which this scenario is based is in the beginning stages of litigation in Columbus, Ohio, with cross motions for summary judgment pending as this is written.

¹⁷ Based on studies about drug abuse in the military, *see, e.g.*, MICHAEL D. NEWCOMB, DRUG ABUSE IN THE WORKPLACE: RISK FACTORS FOR DISRUPTIVE SUBSTANCE USE AMONG YOUNG ADULTS 8-10 (1988); *Drug Abuse in the Military: Hearing Before the Subcomm. on Children, Family, Drugs and Alcoholism of the Senate Comm. on Labor and Human Resources*, 99th Cong. (1985), it is quite probable that this scenario represents the experiences of many men and women. Although this scenario mentions the military, all individuals with a history of drug addiction could, of course, be included in this discussion. It has been recently estimated that there are about 13 million Americans who currently use illegal drugs. *See* U.S.

circumstances surrounding his drug abuse would probably be considered addiction by most definitions.¹⁸ He was never caught or disciplined for this drug addiction, and it never affected the performance of his military duties. In fact, he has received commendations for his excellent military record. John has never used illegal drugs since his honorable discharge from military duty. Now, ten years after his discharge, John applied for a police officer position with his city. He appears qualified in every respect. In fact, he made the eligibility list and, because of his position on the list, was expected to be chosen for the position in a few months.

In one stage of the application process, however, John truthfully admitted his past drug usage and explained his total rehabilitation from drug addiction. Because of John's history, the city removed his name from the eligibility list, pursuant to the jurisdiction's civil service regulations. The city did not assume that John was currently using drugs or that he could not perform the functions of a police officer. The only reason the city gave for his disqualification was that a history of drug use, according to the civil service regulations, demonstrated a lack of "respect for the law"—an "essential function" of the police officer position. According to the city, no other reason for disqualification was legally necessary.

Dep't of Health & Human Services, Substance Abuse—A National Challenge (visited Mar. 14, 1998) <<http://www.health.org/mtf/hhsfact.htm>>. For a discussion of the difficulties of determining the actual number of drug addicts in the United States, see The Stanton Peele Addiction Web Site, How Many Addicts are There in the U.S. and How is the Drug War Affecting This Number? (visited Sept. 17, 1998) <<http://www.peele.net/faq/addicts.html>>.

¹⁸ See, e.g., Ronald M. Paolino, *Identifying, Treating, and Counseling Drug Abusers*, in DRUG TESTING: ISSUES AND OPTIONS 215, 218 (Robert H. Coombs & Louis Jolyon West eds., 1991) (noting that not all drug abusers become addicts; three criteria are identified for defining addiction: loss of control in using the drug, craving and compulsion, and continued use despite adverse consequences); DAVID A. PETERS, THE PROBABILITY OF ADDICTION: LEGAL, MEDICAL AND SOCIAL IMPLICATIONS 35–38 (1997) (explaining the difference between drug use and drug addiction).

Defining addiction becomes important, as will be discussed later, because the Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (1994), which prohibits employment discrimination against individuals with a "disability," defines disability as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2)(A). It is doubtful that occasional use of an illegal drug would ever fit into the ADA's definition of "disability." See, e.g., U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EEOC TECHNICAL ASSISTANCE MANUAL § 8.5 (1992) [hereinafter TECHNICAL ASSISTANCE MANUAL]. For further discussion of drug addiction as a disability, see *infra* Part III.D.

III. THE DISABILITY OF ADDICTION AND ITS MORAL OVERTONES

A threshold inquiry is whether or not drug addiction itself is a disability. Although much has been written on this topic,¹⁹ and it seems generally not to pose much difficulty for courts,²⁰ a brief discussion is warranted at the outset because of the perceived connection between drug addiction and character traits relevant to public safety officer qualifications.

A. *The Medical Recognition of Drug-Related Disabilities*

The recognition of drug addiction as a disability worthy of protection under civil rights legislation arises from the development of scientific knowledge about disease.²¹ Decades ago, it was almost universally believed that drug addiction reflected personal failures and inadequacies.²² And, although many today would

¹⁹ See, e.g., DRUG ADDICTION AND ITS TREATMENT: NEXUS OF NEUROSCIENCE AND BEHAVIOR (Bankole A. Johnson & John D. Roache eds., 1997); Reese John Henderson, Jr., *Addiction As Disability: The Protection of Alcoholics and Drug Addicts Under the Americans With Disabilities Act of 1990*, 44 VAND. L. REV. 713 (1991).

²⁰ See, e.g., *Linder v. United States*, 268 U.S. 5, 18 (1925) (noting that individuals addicted to drugs are "diseased and proper subjects for . . . treatment"); *School Bd. of Nassau County, Florida v. Arline*, 480 U.S. 273, 285 n.14 (1987) (explaining that Congress understood drug addiction as a disability); *Simpson v. Reynolds Metals Co., Inc.*, 629 F.2d 1226, 1231 n.8 (7th Cir. 1980) ("Individuals with current problems or histories of alcoholism or drug abuse qualify as 'handicapped individuals . . .'"); *National Treasury Employees Union v. Reagan*, 685 F. Supp. 1346, 1353 (E.D. La. 1988) ("Alcoholism or other drug abuse are considered handicapping conditions under [the Rehabilitation Act]."); *Grimes v. United States Postal Serv.*, 872 F. Supp. 668, 675 (W.D. Mo. 1994) ("The Rehabilitation Act is designed to protect a drug addict who voluntarily identifies his problem, seeks assistance, and stops using illegal drugs." (citation omitted)).

²¹ See, e.g., HAROLD E. DOWEIKO, CONCEPTS OF CHEMICAL DEPENDENCY 6-9, 208-44 (3d ed. 1996) (explaining the evolving concept of addiction and the general recognition of addiction as a medical disorder); Luiz R.S. Simmons & Martin B. Gold, *Notes Toward a General Theory of Addict Rehabilitation*, in DISCRIMINATION AND THE ADDICT 11 (Luiz R.S. Simmons et al. eds., 1973) (citations omitted) ("Unquestionably public policy toward the narcotic addict has changed dramatically. The addict is, at least in theory, no longer the peculiar problem of law enforcement, as a general recognition that the addict may be a sick or diseased person has permeated public policy and increasingly private attitudes.").

²² See LUIZ R.S. SIMMONS & MARTIN B. GOLD, DISCRIMINATION AND THE ADDICT 12 (Luiz R.S. Simmons & Martin B. Gold eds., 1973); cf. Jeffrey A. Schaler, *Drugs and Free Will*, SOCIETY, Sept./Oct. 1991, at 42-44. But cf. SIMON DINIETZ ET AL., DEVIANCE 277 (1969) ("Because [drug] use is labeled deviant, criminal, and outside legitimate medical practice, users develop a life style quite far removed from that of straight society. The roles, statuses, functioning, and self-concepts of the users are derived from this subculture. Quite apart from the effects of the drugs, it is this involvement and participation in a deviant subculture which

still agree that there are personal contributors to the individual's illness, a large and growing number of medical professionals recognize that addiction is a disease, complete with complex biological factors.

Drug addiction has been legally recognized as a disability for decades,²³ and current scientific research continues to validate this position.²⁴ *Time* magazine, which recently published an article on current research into addiction, reports:

As scientists learn more about how dopamine [a molecule that transmits messages from one neuron to another] works (and how drugs work on it), the evidence suggests that we may be fighting the wrong battle. Americans tend to think of drug addiction as a failure of character. But this stereotype is beginning to give way to the recognition that drug dependence has a clear biological basis. "Addiction . . . is a disorder of the brain no different from other forms of mental illness."²⁵

Additionally, in a recent report from the National Institute of Health, medical authorities recognized that once an individual is dependent on a drug, such dependence constitutes a medical disorder.²⁶ As mounting research continues to

nullifies most treatment efforts and leads to the high rates of return to drug use after treatment.").

²³ See, e.g., *Linder*, 268 U.S. at 18 (noting that individuals addicted to drugs are "diseased and proper subjects for . . . treatment"); *Davis v. Bucher*, 451 F. Supp. 791, 795–96 (E.D. Pa. 1978) (noting that "[i]t is undisputed that drug addiction substantially affects an addict's ability to perform major life activities," which qualifies an individual who is addicted to drugs for protection under the statutes); *Whitaker v. Board. of Higher Educ.*, 461 F. Supp. 99, 106 n.7 (E.D.N.Y. 1978) (explaining that the protections of the Rehabilitation Act extend to individuals addicted to drugs); 43 Op. Att'y Gen. 75 (1977) (stating that Congress intended to include individuals with drug addictions within the coverage of the Rehabilitation Act).

²⁴ See, e.g., NORMAN S. MILLER, *ADDICTION PSYCHIATRY: CURRENT DIAGNOSIS AND TREATMENT* 81–105 (1995); Frank R. George, *The Genetics of Addiction*, in *DRUG ADDICTION AND ITS TREATMENT: NEXUS OF NEUROSCIENCE AND BEHAVIOR* 187, 201–02 (Bankole A. Johnson et al. eds., 1997) (explaining the biological factors of the disease of addiction, the author writes that although there is no "addiction gene," there is a "biological contribution" to drug addiction that results from the interactions among several genes).

²⁵ J. Madeleine Nash, *Addicted: Why do People Get Hooked? Mounting Evidence Points to a Powerful Brain Chemical Called Dopamine*, *TIME*, May 5, 1997, at 68, 70 (quoting Dr. Nora Volkow of the Brookhaven National Laboratory in New York); see also *id.* at 74 (noting also that "[f]or years scientists have suspected that genes play a critical role in determining who will become addicted to drugs and who will not. But not until now have they had molecular tools powerful enough to go after the prime suspects. . . . Several dopamine genes have already been tentatively, and controversially, linked to alcoholism and drug abuse.").

²⁶ See National Institute of Health, *Effective Medical Treatment of Heroin Addiction*, NIH Consensus Statement No. 108 (Nov. 17–19, 1997) (visited Jan. 14, 1999) <http://odp.od.nih.gov/consensus/con/108/108_intro.htm> [hereinafter NIH Consensus

validate the treatment of addiction as a medical disease,²⁷ its status as a disability for purposes of civil rights protections is further justified.

B. Criticisms of Treating Drug Addiction as a Protected Disability

The classification of drug addiction as a disability is not without its critics. Some point to the appearance of a double standard. What message would the nation be sending if America, on one hand, wages the "War on Drugs" and, on the other, protects individuals who have been addicted to illegal drugs from employment discrimination?²⁸ How can America make clear its policies of drug-related law enforcement while at the same time protect those who provide a market for drugs in this country? And how can employers establish and maintain drug-free workplace policies in the face of liability when they refuse to hire individuals who have previously been addicted to drugs?²⁹ Additionally, would employers be exposed to negligent hiring claims if they were to hire individuals who were formerly addicted to illegal drugs—whose possible relapse may result in injury to third parties?³⁰

Indeed, legislators raised such concerns in the congressional debates over the ADA, noting that offering protection to individuals addicted to illegal drugs may

Statement] (although dealing solely with addiction to opiates, this statement is equally applicable to addiction to other drugs).

²⁷ See MILLER, *supra* note 24, at 81.

²⁸ For example, Senator Helms made the following statements on the floor of Congress during the debates over the provisions of the ADA dealing with drug addiction:

On Tuesday night we launched a war on drugs. Both President Bush and our colleague, Mr. Biden, committed themselves and their parties to eliminating the scourge of drugs from our streets. I think there is no better time than now to start this bipartisan battle for the very soul of our Nation. It is time to put our rhetoric into action. We can start by getting tough and smart with drug addicts.

135 CONG. REC. 19,874 (1989) (statement by Sen. Helms) (emphasis added).

²⁹ Senator Harkin sought, during the Congressional debates over the ADA, to allay this concern: "I think we can assure . . . employers, without hesitation, that employers will not face litigation under the ADA on the part of *current* users of illegal drugs and alcohol either for testing or for taking disciplinary action against such individuals based on such testing." 135 CONG. REC. 19,877 (1989) (statement of Sen. Harkin) (emphasis added).

³⁰ Generally, the standard for negligent hiring is that an employer will be liable for injuries caused by employees to third parties when the employer could reasonably foresee, based on employee background checks, that the injury may occur. *See, e.g.*, Logan v. West Coast Benson Hotel, 981 F. Supp. 1301 (D. Or. 1997); Lester v. Town of Wintrop, 939 P.2d 1237 (Wash. Ct. App. 1997); Pruitt v. Pavelin, 685 P.2d 1347 (Ariz. Ct. App. 1984).

thwart employers' efforts to maintain a drug free workplace.³¹ In spite of these criticisms, Congress extended the ADA's protections to individuals who have been rehabilitated from drug addiction. As will be discussed, many of the criticisms can be answered effectively when one separates the medical disability of addiction from an individual's *status* as an addict.³² In addition, the laws do not protect individuals currently using drugs (including those currently addicted), but only those who no longer use drugs or who are in a rehabilitation program.³³

Other criticisms revolve around the perceived voluntary nature of drug use leading to addiction. For example, one critic of the disease model of drug addiction wrote: "Drug addicts simply have different values from the norm and often refuse to take responsibility for their actions. Public policy based on the disease model of addiction enables this avoidance to continue by sanctioning it in the name of helping people."³⁴ If the individual would not have started, the critic says, he or she would not now be addicted.³⁵ Indeed, professionals have noted the difficulty in determining whether the root of drug addiction is a medical disorder, such as a genetic predisposition, or some other combination of

³¹ See, for example, the statements of Senator Helms criticizing the ADA's protection of individuals with drug addictions:

Many [employers] have adopted get tough policies against drug addicts, but as a consequence of the Rehabilitation Act, they have been forced by the Federal authorities to change their policies and to even take back . . . employees whom they have expelled or fired for repeated drug violations. . . . It is exceedingly difficult to confront and discipline a member of a "protected class" who is subject to the extensive and complete procedural safeguards of the Rehabilitation Act.

135 CONG. REC. 19,874 (1989) (statement by Sen. Helms).

³² See *infra* notes 93–97 and accompanying text.

³³ See *infra* Part III.D.

³⁴ Schaler, *supra* note 22, at 42, 49; cf. *Tudyman v. United Airlines*, 608 F. Supp. 739, 746 (C.D. Cal. 1984) (comparing the voluntary nature of plaintiff's muscular physique resulting from bodybuilding, which put him over the weight limit for a flight attendant position, to drug addiction). The court in *Tudyman* noted that although drug addiction has been recognized as voluntary, it is still covered by the Rehabilitation Act and the ADA because Congress so provided. See *id.* (citing *Davis v. Bucher*, 451 F. Supp. 791 (E.D. Pa. 1978)). But cf. *Robinson v. California*, 370 U.S. 660, 667 n.9 (1962) (noting that addiction may not be a voluntary condition and explaining: "Not only may addiction innocently result from the use of medically prescribed narcotics, but a person may even be a narcotics addict from the moment of his birth."); *id.* at 670 (Douglas, J., concurring) ("The first step to addiction may be as innocent as a boy's puff on a cigarette in an alleyway. It may come from medical prescriptions. Addiction may even be present at birth.").

³⁵ This exemplifies the nineteenth-century notion that disease "is a product of will" and that "the presence of disease signifies that the will itself is sick." SUSAN SONTAG, *ILLNESS AS METAPHOR AND AIDS AND ITS METAPHORS* 43 (1990).

sociological, psychological, or economic factors.³⁶ The mystery surrounding the roots of addiction is perhaps why critics are quicker to let the individual bear the onus of blame for his or her perceived social and moral wrongs.³⁷

Although progress has been made, the separation of drug addiction from its moral overtones is far from complete. The perceived connection between one's drug use and his or her character is reminiscent of the out-dated belief that all illnesses and disabilities are a "product of a will or a choice."³⁸ One commentator recently noted that "[t]he identification of a pathological mental state or character has left us with a lingering sense of personal responsibility for certain illnesses."³⁹ Surely drug addiction is such an illness. Drug abusers are often perceived as manipulative, sociopathic troublemakers.⁴⁰ This may not be an accurate portrayal of the individual addicted to drugs,⁴¹ especially one who has been rehabilitated.

C. Policing Character: Civil Service Regulations and Drug Abuse History

Most state and local employers in charge of hiring public safety officers are guided by laws and regulations that purport to give them authority to exclude individuals with drug histories from certain positions. A great number of the regulations requiring applicants to be free from drug abuse histories do so as a proxy for the applicant's moral character.

Many varieties of laws and regulations that relate to former drug use or addiction exist. Some make *any* previous drug use dispositive of bad character or otherwise disqualify an applicant. For example, the Florida Administrative Code states: "The unlawful use of any of the controlled substances . . . by an applicant for certification, employment, or appointment, at any time proximate to such application for certification, employment, or appointment, *conclusively*

³⁶ See NIH Consensus Statement, *supra* note 26; DOWEIKO, *supra* note 21, at 208–44.

³⁷ See SONTAG *supra* note 35, at 61 ("And it is diseases thought to be multi-determined (that is, mysterious) that have the widest possibilities as metaphors for what is felt to be socially or morally wrong.").

³⁸ Adrienne L. Hiegel, *Sexual Exclusions: The Americans with Disabilities Act as a Moral Code*, 94 COLUM. L. REV. 1451, 1455 (1994); see also Robinson v. California, 370 U.S. 660, 669 (1962) (Douglas, J., concurring); Schaler, *supra* note 22, at 42 ("The moralistic model [considers] addiction . . . to be [the] result of low moral standards, bad character, and weak will. Treatment consists of punishment for drug-using behavior. The punitive nature of America's current war on drugs with its call for 'user accountability' is typical of the moralistic perspective. Addicts are viewed as bad people who need to be rehabilitated in 'boot camps.' They are said to be lacking in values.").

³⁹ Hiegel, *supra* note 38, at 1456.

⁴⁰ See Paolino, *supra* note 18, at 219.

⁴¹ See *id.*

establishes that the applicant is not of good moral character."⁴² Although specifying that drug use at any time before the application "conclusively establishes" that the applicant is not qualified for the position, the statute's effect is softened somewhat by the next sentence of the regulation. It reads:

The unlawful use of any of the controlled substances specified . . . by an applicant at any time remote from and not proximate to such application, may or may not conclusively establish that the applicant is not of good moral character . . . , depending upon the type of controlled substance used, the frequency of use, and the age of the applicant at the time of use.⁴³

Applicants who have been rehabilitated for a number of years, therefore, could conceivably escape the determination that they are not of good moral character.⁴⁴ The impact of this provision is not known because of the lack of reported cases on the subject. Unlike a blanket exclusion (which Florida municipalities may still have), this provision appears to provide the trier of fact with the opportunity to assess applicants on a case-by-case basis—something that the Florida courts have stated is desirable.⁴⁵ The "conclusively establishes" language, however, is still troublesome. At least one Florida court has strictly construed similar language in other civil service regulations.⁴⁶

Although the Florida regulation explicitly defines good moral character to

⁴² FLA. ADMIN. CODE ANN. r. 11B-27.0011(2) (1997) (emphasis added); *see also* FLA. STAT. ANN. 943.13(7) (1996 & Supp. 1999) (stating that all law enforcement and correction officers shall have "good moral character as determined by a background investigation under procedures established by the commission").

For additional examples of statutes that explicitly tie drug abuse with moral character, *see* MO. REV. STAT. § 590.135(4) (1998) (similar to Washington); S.C. CODE ANN. § 23-6-440(B)(5) (Law Co-op. 1996) ("In the director's determination of good character, the director shall also give consideration to all law violations. . . . The director shall also give consideration to the candidate's prior history, if any, of alcohol and drug abuse in arriving at a determination of good character."); WASH. ADMIN. CODE § 415-104-688(c) & (d) & 415-104-740(4)(c) & (d) (1997) (mentioning drug addiction and the use of drugs as conditions that disqualify applicants. No further detail is given in the regulations about whether this refers to current or past drug addiction, or both.).

⁴³ FLA. ADMIN. CODE ANN. r. 11B-27.0011(2) (1997).

⁴⁴ The Florida courts have noted that the determination of applicant's good moral character under this regulation is an issue for the trier of fact. *See* *Albert v. Dep't of Law Enforcement, Criminal Justice Stnds and Training Comm'n*, 573 So. 2d 187, 188 (Fla. Dist. Ct. App. 1991).

⁴⁵ *See* *Cirnigliaro v. Florida Police Standards & Training Comm'n*, 409 So. 2d 80, 85 (Fla. Dist. Ct. App. 1982) (noting that "[i]t is unfortunate that the legislature has not provided in the statute for instances of rehabilitation").

⁴⁶ *See id.*

exclude past drug use, many other regulations are not as specific. For example, the South Dakota Administrative Code (like that of many states) reads, "A person may not be temporarily or permanently employed or certified as a law enforcement officer or continue to be employed or certified as a law enforcement officer unless he meets the following requirements: . . . Is of good moral character."⁴⁷ Any regulation that requires good moral character may be used to exclude individuals with drug histories. The difficulty in obtaining information about the underlying reason for rejecting public safety officer applicants makes it impossible to determine how pervasive the drug-free history requirement is in practice.

This difficulty is amplified in the states that only specify minimum qualifications for public safety officers and leave more stringent qualifications up to local governments.⁴⁸ Ohio, for example, leaves it to the discretion of the

⁴⁷ S.D. ADMIN. R. 2:01:02:01 (1997); *see also, e.g.*, WIS. ADMIN. CODE § 2.01(1)(f) (1997) ("The applicant shall be of good moral character.").

⁴⁸ *See, e.g.*, WEIL'S CODE OF WYOMING RULES 015-080-002 § 1(f) ("The standards set forth in [the Wyoming statutes], concerning peace officer and/or detention officer qualifications shall be deemed minimum standards and in no way preclude counties, cities, or towns from establishing higher employment standards."); WIS. ADMIN. CODE § 2.01(4) ("The foregoing are minimum qualifications. Higher qualifications are strongly recommended where the employing authority is in a position to require them."). Prompted by a change in policy at the Prince George's County Police Department, which opened opportunities in the police department for individuals with drug abuse histories, the Maryland legislature passed a law that gave local governments more discretion over police qualifications. *See Wagner, supra* note 13, at C9; H.B. 307, 1997 Reg. Sess. (Md. 1997), *available in* LEXIS at 1997 Bill Text MD H.B. 307 (codified at MD. CODE ANN., Executive Dep't § 4-201 (Supp. 1997)). Although the bill was enacted, significant changes were made, which included deleting most references to an applicant's drug abuse history. *See id.* § 4-203 (A)-(D).

An example of more stringent qualification standards established by local governments can be found in the "Guidelines for Background Monitoring of Police Officer and Firefighter Applicants" section of the civil service regulations for the city of Columbus, Ohio: "Any usage of certain drugs, such as heroin, cocaine, LSD, crack, crank, PCP, may be cause for rejection. Any habitual or pattern of drug usage, even as juvenile or a long time ago, may be cause for rejection." COLUMBUS CIVIL SERVICE COMMISSION, CITY OF COLUMBUS, OHIO, RULES AND REGULATIONS OF THE MUNICIPAL CIVIL SERVICE COMMISSION (1987 & amendments through 1996). Although the Columbus civil service commission states in the regulations that these standards were made with an attempt to comply with the Americans with Disabilities Act, *see id.*, such an assertion is unpersuasive in light of the fact that the "any habitual use" standard—which, of course, would include past addiction to drugs regardless of whether or not the individual has been rehabilitated—is directly contrary to the ADA and Rehabilitation Act. The statutes protect individuals who have been rehabilitated from drug addiction. *See* 42 U.S.C. § 12114(a) (1994); 29 U.S.C.A. § 705(20)(C)(ii) (1999); *infra* Part V.

In addition to local government regulations, contracts with unions, such as the Fraternal Order of Police (FOP), may prohibit a municipality from accepting applicants with histories of

Administrative Services Director to disqualify an applicant who "has been guilty of infamous or notoriously disgraceful conduct."⁴⁹ This, of course, could include past drug addiction.

Although these types of laws leave a great deal of discretion regarding an applicant's history of drug use, they should not necessarily be considered more benign.⁵⁰ In fact, a similar regulation that left it to the discretion of the civil service director to disqualify an applicant who "either during or after an examination . . . is addicted to the intemperate use of intoxicating liquors, or the use of harmful drugs" was interpreted by the city officials to include *all* past drug users. The effect of more general standards also can be seen in the following statement by a New York court:

Although appointments to the uniformed force of the State Police are governed by . . . the New York State Constitution and by applicable provisions of the Civil Service Law, sole authority for the examination, qualification and appointment of members is vested in the Superintendent of State Police by virtue of the Executive Law . . . , [which] requires that any person appointed as a State Trooper be possessed of fitness and good moral character Thus, the Superintendent had the power and authority to determine, as a matter of discretion, the "fitness and good moral character" of the petitioner as a qualification of such appointment. The exercise of this discretion, as long as it is

drug addiction. See Timothy R. Gaffney, *Judge Blocks Police Recruits*, DAYTON DAILY NEWS, May 19, 1997, at 1B ("The FOP maintains that Dayton's Civil Service Board violated a 1995 contract between the FOP and the city by accepting the recruits, who have admitted using illegal drugs in the past. The contract prohibits the city from hiring any police officer who ever used any illegal drug other than marijuana"); Lou Grieco, *FOP Files Grievance on Drug Policy*, DAYTON DAILY NEWS, Mar. 11, 1997, at 2B.

⁴⁹ OHIO REV. CODE ANN. § 124.25 (Anderson 1997), reprinted in OHIO CIVIL SERVICE & COLLECTIVE BARGAINING: LAWS & RULES ANNOTATED 192 (Jonathan J. Downes ed. 1997). The Ohio rule specifies that anyone "who is addicted to the habitual use of . . . drugs in excess" can also be disqualified. *Id.*; see also ALA. CODE § 36-26-15(a) (1996) (similar to Ohio); MICH. STAT. ANN. § 5.1191(110) (1997) (similar to Ohio); 53 PA. CONS. STAT. § 46183 (1997) & 37 PA. CODE § 203.11 (1997) (similar to Ohio); TENN. CODE ANN. 8-30-305 (1997) (similar to Ohio); DEL. CODE ANN. tit. 29, § 8914 (1996) ("Applications shall also be rejected if the applicant . . . has a record of court convictions or infamous or other conduct which renders the applicant unsuitable for employment."); GA. CODE ANN. § 35-8-7.1(a) (1997) ("The council shall have the authority to refuse to grant a certification to an applicant . . . upon a determination by the council that the applicant . . . has: . . . Committed a crime involving moral turpitude, without regard to conviction. . . . Violated or attempted to violate a law, rule, or regulation of this state, any other state, the council, the United States, or any other authority without regard to whether the violation is criminally punishable. . . . Committed any act or omission which is indicative of bad moral character or untrustworthiness.").

⁵⁰ See Davis v. Bucher, 451 F. Supp. 791 (E.D. Pa. 1978).

rational, is not prohibited by the constitutional provisions relating to the Civil Service.⁵¹

A more detailed law may actually be beneficial to an applicant with a history of drug addiction. For example, in Illinois, an applicant for a firefighter position who admitted prior drug use was denied employment.⁵² However, the court found that this denial was contrary to the state civil service laws, which provided a detailed list of all conduct that would disqualify an applicant.⁵³ Past use or possession of marijuana was not listed and, therefore, could not be used to deny the applicant employment.⁵⁴

Other states do not mention moral character *per se*, but specify the number of years an individual has to have been drug free, the extent of past drug use, or the type of drug necessary for disqualification. California provides an example of this type of regulation: "Any applicant for a State civil service examination for a peace officer class who discloses or whose background investigation reveals use of a drug for which possession would constitute a felony . . . subsequent to his or her eighteenth birthday shall be disqualified from the examination . . . unless 10 years have elapsed from the date of the disclosed use of the drug."⁵⁵ Thus, under

⁵¹ *Shedlock v. Connelie*, 414 N.Y.S.2d 55, 56 (N.Y. App. Div. 1979).

⁵² *See Murbach v. Anderson*, 422 N.E.2d 41, 42 (Ill. App. Ct. 1981).

⁵³ *See id.* at 44.

⁵⁴ *See id.* at 44-45.

⁵⁵ CAL. CODE REGS. tit. 2, § 213.5 (1997). A more detailed regulation specifying years of abstinence and extent of drug use is found in Arizona. It specifies:

10. The person shall not have illegally used marijuana for any purpose within the past three years.
11. The person shall never have illegally used marijuana other than for experimentation.
12. The person shall never have illegally used marijuana while employed or appointed as a peace officer
14. The person shall not have illegally used dangerous drugs or narcotics, other than marijuana, for any purpose within the past seven years.
15. The person shall never have illegally used dangerous drugs or narcotics other than for experimentation.
16. The person shall never have illegally used dangerous drugs or narcotics while employed or appointed as a peace officer
- B. The use of an illegal drug is presumed to be not for experimentation if:
 1. The use of marijuana exceeds a total of 20 times or exceeds five times since the age of 21 years.
 2. The use of dangerous drugs or narcotics, other than marijuana,

this regulation, an individual's drug use before he or she turns eighteen is not considered, and the individual must have been drug free for ten years before the application.

D. Congressional Treatment of Drug Addiction as a Disability

The legality of many of the above state and local regulations is questionable in light of the congressional understanding of drug addiction as a disability. In spite of the debates about the nature of addiction, Congress has determined that, for the purposes of civil rights laws, drug addiction must be considered a disability.⁵⁶ This position not only exhibits the national recognition of the prevalence of drug addiction in society and compassion for individuals who are addicted to illegal substances, but it is also believed to be a necessary element in the nation's attack on the drug problem itself.⁵⁷

Both the ADA and the Rehabilitation Act cover drug addiction. The ADA's definition of "disability" includes the following language: "The term 'disability' means . . . a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; [or] a record of such . . . impairment; [or] being regarded as having such an impairment."⁵⁸ The Rehabilitation Act, which applies to the federal government and other entities receiving federal funds,⁵⁹ uses similar language.⁶⁰ Courts, Congress, and

exceeds a total of five times, or exceeds one time since the age of 21 years.

ARIZ. ADMIN. CODE § R13-4-105 (1997).

The Utah regulations are also interesting. Although the statute states that drug addiction is cause for denial of certification of a peace officer, *see* UTAH CODE ANN. § 53-6-211(1)(d)(iii) (1994 & Supp. 1997), the regulations appear to make room for individuals who have their addiction "under control." *See* UTAH ADMIN. CODE R728-409-3(D)(2)(b) (1997) ("No applicant shall be granted peace officer certification or authority if it is demonstrated that the applicant has a drug addiction which is not under control.").

⁵⁶ *See* H.R. REP. NO. 101-485(II), at 51, *reprinted in* 1990 U.S.C.C.A.N. 303, 333 ("It is not possible to include in the legislation a list of all the specific conditions, diseases, or infections that would constitute physical or mental impairments. . . . [T]he term [disability] includes, however, such conditions . . . as . . . drug addiction."); *accord* H.R. REP. NO. 101-485(III), at 28, *reprinted in* 1990 U.S.C.C.A.N. 445, 451; S. REP. NO. 101-116, at 22; *see also*, e.g., *National Treasury Employees Union v. Reagan*, 685 F. Supp. 1346, 1353 (E.D. La. 1988) ("Alcoholism or other drug abuse are considered handicapping conditions under [the statutes]."); *infra* Part III.D.

⁵⁷ Henderson, *supra* note 19, at 736.

⁵⁸ 42 U.S.C. §§ 12102(2)(A)-(B) (1994).

⁵⁹ *See* 29 U.S.C. § 794(a) (1994).

⁶⁰ When enacted in 1973, the Rehabilitation Act used the term "handicap." *See*

commentators have made clear that these two pieces of legislation are intended to overlap so that one can rely on precedent established under either the ADA or Rehabilitation Act when interpreting certain provisions, such as what constitutes a disability under either statute.⁶¹

Drug addiction was explicitly cited in the congressional committee reports as a "physical or mental impairment" that falls within this definition of disability.⁶² According to the above definition, however, having a physical or mental impairment alone is not sufficient; the impairment must "substantially limit[] one or more of the major life activities of [the] individual."⁶³ In keeping with the understanding of how addiction would fit under the term disability and the intention of Congress,⁶⁴ however, this requirement should be no more difficult to meet. Congress explained that major life activities include such things as working, walking, and seeing.⁶⁵ Clearly an individual addicted to illegal drugs (thus meeting the "physical or mental impairment" requirement) should not have difficulty convincing anyone that the drug use substantially limited one of these activities.⁶⁶ The effects of drug abuse on simple tasks are well documented⁶⁷

Rehabilitation Act of 1973, Pub. L. No. 93-111, 87 Stat. 355. Because the term handicap is now considered offensive, the 1992 amendments to the Rehabilitation Act replaced the term "handicap" with "disability." See Rehabilitation Act Amendments, Pub. L. No. 102-569, § 706(8), 106 Stat. 4348-49 (1992). The ADA also uses the term "disability." See H.R. REP. NO. 101-485(II), at 50, *reprinted in* 1990 U.S.C.C.A.N. 303, 332 ("The use of the term 'disability' instead of 'handicap' . . . represents an effort by the Committee to make use of up-to-date, currently accepted terminology. . . . Congress has been apprised of the fact that to many individuals with disabilities the terminology applied to them is a very significant and sensitive issue.").

⁶¹ See 29 U.S.C. § 794(d) (1994) ("The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990."); see also *Gile v. United Airlines*, 95 F.3d 492 (7th Cir. 1996); *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723 (5th Cir. 1995); *Myers v. Hose*, 50 F.3d 278 (4th Cir. 1995); Eric Harbrook Cottrell, *There's Too Much Confusion Here, and I Can't Get No Relief: Alcoholic Employees and the Federal Rehabilitation Act in* Little v. FBI, 72 N.C. L. REV. 1753 (1994); John L. Flynn, *Mixed-Motive Causation Under The ADA: Linked Statutes, Fuzzy Thinking, and Clear Statements*, 83 GEO. L.J. 2009 (1995).

⁶² See *supra* note 56.

⁶³ 42 U.S.C. §§ 12102(2)(A)-(B) (1994); 29 U.S.C.A. § 705(a)(B) (1999).

⁶⁴ See, e.g., H.R. REP. NO. 101-485(II), at 51, *reprinted in* 1990 U.S.C.C.A.N. 303, 333-34; 135 CONG. REC. 19,873-77 (1989).

⁶⁵ See H.R. REP. NO. 101-485(II), at 51-52, *reprinted in* 1990 U.S.C.C.A.N. 303, 333-34.

⁶⁶ See, e.g., *Davis v. Bucher*, 451 F. Supp. 791, 795-96 (E.D. Pa. 1978) (noting that "it is undisputed that drug addiction substantially affects an addict's ability to perform major life activities," which qualifies an individual who is addicted to drugs for protection under the

and, thanks to drug education programs,⁶⁸ well known.

The ADA also defines disability as having “a record of” a physical or mental impairment that substantially limits a major life activity.⁶⁹ Individuals who have previously been addicted to drugs, but who have since been (or are being) rehabilitated, would be considered disabled under this provision of the ADA as well—even though they may no longer be substantially limited in a major life activity.⁷⁰ The third category of the definition of disability—being regarded as having a disability—may also be applicable. Any concerns about the possibility

statutes); *Buckley v. Consolidated Edison Co. of New York*, 127 F.3d 270, 273 (2d Cir. 1997) (noting that if a person establishes past addiction, “recovering addicts, so long as they are not currently using drugs, will *automatically* be covered under § 12101(2)(B)” [the substantial limitation of a major life activity requirement] (emphasis added)); *Johnson v. St. Clare’s Hosp. & Health Ctr.*, 1998 WL 213203, at *6 (S.D.N.Y. Apr. 20, 1998) (“In other words, a recovering alcoholic [or drug addict] need not show that one or more of his major life activities is currently impaired by alcohol [or drug] use in order to be protected from discrimination. . .”).

⁶⁷ See generally DOUGLAS W. MATHESON & MERIDITH A. DAVISON, *THE BEHAVIORAL EFFECTS OF DRUGS* (1972).

⁶⁸ See, e.g., 20 U.S.C. §§ 7101–7105 (1994) (“The Safe and Drug Free Schools and Communities Act of 1994”).

⁶⁹ See 42 U.S.C. § 12102(2)(B) (1994).

⁷⁰ See, e.g., *Ambrosino v. Metropolitan Life Ins. Co.*, 899 F. Supp. 438, 442 (N.D. Cal. 1995) (explaining that “‘a history of addiction’ is intended to be a protected disability”); *Buckley*, 127 F.3d at 270 (holding that an employee’s status as a “recovering drug addict” was a disability under the ADA).

The Supreme Court summed up the logic of including past drug addiction in the legal understanding of a covered disability:

By amending the definition of “handicapped individual” to include not only those who are actually physically impaired, but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society’s accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment. . . . Congress reaffirmed this approach in its 1978 amendments to the [Rehabilitation] Act. There, Congress recognized that employers and other grantees might have legitimate reasons not to extend jobs or benefits to drug addicts and alcoholics, but also understood the danger of improper discrimination against such individuals if they were categorically excluded from coverage under the Act. Congress therefore rejected the original House proposal to exclude addicts and alcoholics from the definition of handicapped individual, and instead adopted the Senate proposal excluding only those alcoholics and drug abusers “whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment . . . would constitute a direct threat to property or the safety of others.”

School Bd. of Nassau Co. v. Arline, 480 U.S. 273, 284, 285 n.14 (1987).

of the rehabilitated applicant's relapse can be used to assert that the employer regarded the applicant as being disabled. Although these provisions clearly protect individuals who have been rehabilitated from drug addiction and have ceased drug abuse,⁷¹ many public employers still exclude individuals who have overcome drug addiction from employment.⁷² Are they breaking the law?

⁷¹ Determining that drug addiction is a disability for the purposes of the ADA and the Rehabilitation Act does not mean that the statute automatically protects all individuals who are addicted to drugs. As will be discussed in Part V, specific provisions of the ADA deal with those *currently* engaged in drug use by stating that they are not to be considered qualified. The treatment of drug addiction as a disability has been summed up by noting that the statutes do "not exclude addiction from the definition of handicaps [or disabilities]; rather, [they] exclude[] from the definition of 'otherwise qualified' those addicts who fall within one of the specific exceptions." Henderson, *supra* note 19, at 730 n.130. This position is supported when one considers the language and structure of the ADA, which excludes current drug users from the definition of "qualified individual with a disability," 42 U.S.C. § 12114(a) (1994), but not from the definition of "disability" itself. On the other hand, the Rehabilitation Act's structure is somewhat different. It states that "the term 'individual with a disability' does not include an individual who is currently engaging in the illegal use of drugs. See 29 U.S.C.A. § 705(20)(C)(i) (1999). Thus it appears that, for the purposes of the Rehabilitation Act, the *current* use of drugs, whether or not rising to the level of addiction, is not a disability. Even though the language of the Rehabilitation Act may not as clearly support the above notion that addiction is a disability but individuals currently addicted to drugs are not "qualified" under the statutes, Congress most likely intended the same interpretation of drug addiction in both acts, see *supra* note 61, and therefore it is safe to say that drug addiction alone is sufficient to meet the "disability" requirement of both Acts.

⁷² Some may wonder just how employers find out about the nature and extent of an applicant's drug abuse history. Typically, applicant's for public safety officer positions are asked at some point during the application process to disclose such information. Many individuals who have been rehabilitated, feeling that it is important to be truthful—and possibly believing that they are protected from discrimination—give detailed histories of their drug abuse. See, e.g., *Johnson v. Smith*, Civ. No. 5-84-131, 1985 WL 4998, at *1 (D. Minn. Dec. 13, 1985) (applicant stated on employment questionnaire that he "used marijuana almost daily from 1969 to 1977, that he had used speed 50 to 70 times, LSD 10 times, hash 50 to 100 times, downers 5 times, and alcohol frequently").

The fact that applicants for certain public safety officer positions are asked to disclose information that could reveal a past disability—addiction—raises additional concerns under the disability discrimination statutes that, unfortunately, cannot be discussed at length in this Note. Basically, however, an employer is only permitted to ask about issues directly relevant to the essential functions of the job. See 42 U.S.C. §§ 12112(d)(2)(A)–(B) (1994); 29 C.F.R. § 1630.14. For a more detailed discussion of this issue, see Stephen F. Befort, *Pre-employment Screening and Investigation: Navigating Between a Rock and a Hard Place*, 14 HOFSTRA LAB. L.J. 365 (1997). For sarcastic commentary on the limits placed on pre-employment inquiries, see Peter Huber, Column, *Tests Discriminate*, FORBES, Aug. 11, 1997, at 128.

IV. THE LEGALITY OF EXCLUSION: CONSTITUTIONAL AND TITLE VII CLAIMS

Public employers surely have valid concerns regarding the employment of individuals with histories of drug addiction. However, the validity of these concerns and public sympathy for the position of public employers may not be enough to counteract the current state of the law. This Part will begin with a brief discussion of possible constitutional and Title VII claims facing public employers who disqualify individuals based on a history of drug addiction. An initial discussion of such claims is important because, although currently not the most powerful tools to combat this type of employment discrimination, the Supreme Court has not foreclosed the use of the Fourteenth Amendment or Title VII in scenarios such as the one presented in this Note.

A. Constitutional Challenges of Equal Protection and Due Process

An individual who was denied a public safety officer position because of his or her history of drug addiction may have constitutional claims based upon the Due Process⁷³ and Equal Protection⁷⁴ Clauses of the Constitution. Because no fundamental rights are implicated and rehabilitated drug users do not constitute a “suspect class” for constitutional purposes, a low level of scrutiny—the rational basis test—will be used when the courts review these claims.⁷⁵ A due process claim would prevail if the plaintiff had a property or liberty interest in public employment⁷⁶ and the denial of employment was not rationally related to

⁷³ U.S. CONST. amend. XIV, § 1 (“nor shall any State deprive any person of life, liberty, or property, without due process of law”).

⁷⁴ U.S. CONST. amend. XIV, § 1 (“nor deny to any person within its jurisdiction the equal protection of the laws”).

⁷⁵ See, e.g., *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312–14 (1976).

⁷⁶ See *Desper v. Montgomery County*, 727 F. Supp. 959, 964 (E.D. Pa. 1990) (“In order to establish a claim under the fourteenth amendment, plaintiff must show that he has a cognizable property interest in his employment.”). The due process claim would most likely fail if the applicant could not show a property or liberty interest in acquiring the position. See, e.g., *Carmi v. Metropolitan St. Louis Sewer Dist.*, 620 F.2d 672, 675–76 (8th Cir. 1980) (An applicant for a civil service position was found not to have a property interest because there was no reliance on state statutory entitlement, and he had no liberty interest because he did not allege any “impairment of his ability to obtain another job.”); *Rosario v. City of New Haven*, No. 3-93-CV-419 (WWE), 1998 WL 51786, at *3 (D. Conn. Feb. 4, 1998) (finding that rank on an eligibility list was not a “central factor in a communicated policy in hiring . . . police officers” and therefore, was not a property interest). For typical explanations of liberty interests in due process claims, see *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). For typical explanations of property interests, see *Board of Regents of State Colleges v. Roth*, 408 U.S.

legitimate governmental interests. An equal protection claim in this context would prevail if the governmental entity made irrational and over-broad classifications of individuals because of their history of drug addiction.⁷⁷

The plaintiffs in *Beazer v. New York City Transit Authority*⁷⁸ claimed that the denial of employment to all individuals who were addicted to drugs violated both the Due Process and Equal Protection Clauses. The district court agreed,⁷⁹ finding that the regulation, which denied employment to all individuals in rehabilitation, bore no rational relation to the demands of the job to be performed. It created "irrebuttable presumptions of physical inadequacy."⁸⁰ Because of the differences in the individuals involved, the court also noted that the blanket denial and classification of all individuals who were addicted to drugs was over-broad and irrational—employment decisions regarding those with histories of drug addiction must be decided on individual merits.⁸¹

The Supreme Court reversed, finding the transit authority's regulation rationally related to legitimate business interests.⁸² The Court stated "the 'no drugs' policy . . . is supported by the legitimate inference that as long as a treatment program (or other drug use) continues, a degree of uncertainty persists. Accordingly, an employment policy that postpones eligibility until the treatment program has been completed . . . is rational."⁸³ However, the Court's holding was tempered by the fact that the Court focused only on those individuals who were still using controlled substances.

The Supreme Court's opinion is distinguishable from the scenario presented

564, 576-78 (1972).

The applicant's ability to show a liberty or property interest sufficient to sustain due process claims is very unlikely in the scenario presented in this Note. *See Davis v. Bucher*, 451 F. Supp. 791, 799-801 (E.D. Pa. 1978) (finding a due process violation when the city of Philadelphia disqualified applicants on account of their drug histories). *But cf. Stana v. School Dist. of City of Pittsburgh*, 775 F.2d 122, 125-27 (3d Cir. 1985) (finding that plaintiff had a property interest in placement on an eligibility list).

⁷⁷ *See, e.g., Murgia*, 427 U.S. at 307.

⁷⁸ 399 F. Supp. 1032 (S.D.N.Y. 1975). This decision was later reversed by the Supreme Court. *See infra* notes 82-83 and accompanying text.

⁷⁹ *See Beazer*, 399 F. Supp. at 1057.

⁸⁰ *Id.*

⁸¹ *See id.* at 1051 (noting that the New York City Department of Personnel had a more acceptable policy in which "a history of drug addiction shall not in itself constitute a bar to employment"). The Second Circuit affirmed, noting that this result was consistent with precedent. *See Beazer v. New York City Transit Auth.*, 558 F.2d 97, 99 (2d Cir. 1977).

⁸² *See Beazer v. New York City Transit Auth.*, 440 U.S. 568, 594 (1979). This is the Court's only opinion on Fourteenth Amendment challenges to the exclusion of individuals with drug abuse histories from employment.

⁸³ *Id.* at 591.

in this Note. *Beazer* focused on individuals who were *still using* drugs and cited evidence that any continued drug use (even if it were methadone) could effect job performance.⁸⁴ The question of whether or not an individual, *who no longer engages in any use of controlled substances*, can be prohibited from civil employment has not yet been decided by any court.⁸⁵ Justice Powell acknowledged this by noting that the Court “has failed to address what it recognizes as the more difficult issue.”⁸⁶ He understood that in regards to individuals who were completely rehabilitated, the transit authority’s blanket denial of employment was irrational and, thus, violated equal protection and due process.⁸⁷

Although the lowest level of scrutiny would be used for such claims, rational basis scrutiny is not without teeth.⁸⁸ In addition, when the prohibition of individuals who have been addicted to drugs is based on “false presumptions, generalizations, misconceptions, patronizing attitudes, ignorance, irrational fears, and pernicious mythologies,”⁸⁹ it should be considered irrational *per se* in light of the legislative intent of the disability discrimination statutes.⁹⁰ For example, when the Rehabilitation Act was amended in 1978 to offer protection for rehabilitated individuals,⁹¹ Congress made clear that presumptions about the abilities of individuals who have overcome drug addiction was irrational. Senator Williams, in fact, stated: “[A]n employer cannot assume that a history of alcoholism or drug addiction . . . poses sufficient danger in and of itself to justify an exclusion. Such an assumption would have *no basis in fact*.”⁹²

Statements such as these provide hope for the future success of a Fourteenth Amendment challenge. A court may soon hold that an employer’s attempt to discriminate because of one’s *status* as a former addict (rather than his or her present conduct) is irrationally based on generalizations and stereotypes and, therefore, prohibited by the Fourteenth Amendment. The foundation has already

⁸⁴ See *id.* at 573–77.

⁸⁵ See, e.g., *id.* at 572 n.3 (specifying that the Court was not deciding the issue regarding those who had been completely rehabilitated).

⁸⁶ *Id.* at 596 (Powell, J., concurring in part and dissenting in part).

⁸⁷ See *id.* at 596–97 (Powell, J., concurring in part and dissenting in part).

⁸⁸ See, e.g., *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 942 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (“States can ban abortion if that ban is rationally related to a legitimate State interest—a standard which the United States calls ‘deferential, but not toothless.’”).

⁸⁹ H.R. REP. NO. 101-485, pt.2, at 30 (1990), reprinted in 1990 U.S.C.C.A.N. 310, 311.

⁹⁰ See *id.*

⁹¹ For an excellent discussion of this legislative history, see Henderson, *supra* note 19, at 728–30.

⁹² 124 CONG. REC. 37,510 (1978) (emphasis added).

been set.

The status-conduct distinction with regard to drug addiction is not a new development.⁹³ In 1962, *Robinson v. California*⁹⁴ struck down a state statute that criminalized the status of being a narcotics addict. The Court noted that “[i]t is unlikely that any State . . . would attempt to make it a criminal offense for a person to be . . . ill In this court counsel for the State recognized that narcotics addiction is an illness. Indeed, it is apparently an illness which may be contracted innocently or involuntarily.”⁹⁵ Like a criminal law against addiction, an employment disqualification based on drug addiction history is a disqualification based on status—the status of being a former drug addict. Evidence of present drug use, feigned rehabilitation,⁹⁶ or present physical or mental effects of past drug use⁹⁷ should be required for any disqualification of a public safety officer applicant. If a case were presented where an individual with a history of drug addiction was no longer using illegal drugs (or substances like methadone), courts would have the opportunity to follow the rationale of the Southern District of New York and the Second Circuit in *Beazer*—finding a violation of the Fourteenth Amendment.

⁹³ It should also be noted that the Sixth Circuit in *Maddox v. University of Tennessee*, 62 F.3d 843 (6th Cir. 1995), applied this status-conduct distinction in the context of the ADA. The court explained that “a number of cases have considered the issue of misconduct distinct from the status of the disability” and determined that Congress “clearly contemplate[d]” distinguishing the two in the ADA. *See id.* at 847–48. In ADA jurisprudence, courts have consistently distinguished status and conduct. *See, e.g., Landefeld v. Marion General Hosp., Inc.*, 994 F.2d 1178, 1183 (6th Cir. 1993) (Nelson, J., concurring) (“The plaintiff was clearly suspended because of his intolerable conduct, and not solely because of his mental condition.”); *Taub v. Frank*, 957 F.2d 8, 11 (1st Cir. 1992) (noting that the plaintiff was not discharged because he was an addict, but because he possessed heroin for distribution); *Neilsen v. Moroni Feed Comp.*, 162 F.3d 604, 609 (10th Cir. 1998) (“[U]nsatisfactory conduct caused by . . . illegal drug use does not receive protection under the ADA or the Rehabilitation Act. However, the mere status of being an . . . illegal drug user may merit such protection.”). In addition, the Second Circuit recently held that an employee’s *status* as a “recovering drug addict” was a disability under the ADA. *See Buckley v. Consolidated Edison Co. of New York*, 127 F.3d 270 (2d Cir. 1997).

⁹⁴ 370 U.S. 660 (1962).

⁹⁵ *Id.* at 666–67 (emphasis added) (footnote omitted).

⁹⁶ Such as drug use within the last few months.

⁹⁷ *See, e.g., Neilsen*, 162 F.3d at 609 (“[W]hile an alcoholic or drug addict may not be denied services or disqualified from employment solely because of his or her condition, the behavioral manifestations of the condition may be taken into account in determining whether he or she is qualified.” (quoting 42 Fed. Reg. 22,686 (1977))).

B. Title VII

One typically thinks of statutory challenges against individuals with a drug-related disability being brought under the Rehabilitation Act or the ADA (discussed in detail below). However, Title VII of the Civil Rights Act of 1964⁹⁸ has also been used to challenge discrimination against former drug addicts. Although the Supreme Court, dealing with a Title VII challenge based on drug addiction, narrowed the grounds for such a claim, it did not foreclose further Title VII challenges to the blanket denial of employment.

The theory of a Title VII challenge in this area is based on studies that show that a disproportionately large number of former drug addicts are minorities as compared to the number of minorities in the general population.⁹⁹ A minority applicant could challenge, based on the disparate impact theory, an employment qualification that requires a drug-free history. Showing a disparate impact in such case could establish a *prima facie* case under Title VII, placing the burden on the employer to show that the qualification is related to the applicant's ability to perform the job for which he or she is applying.¹⁰⁰

A Title VII claim was successfully argued to the Southern District Court of New York in *Beazer v. New York City Transit Authority*.¹⁰¹ The New York Transit Authority had a regulation that excluded from employment consideration all individuals using methadone, a synthetic narcotic given to aid in the

⁹⁸ 42 U.S.C. §§ 2000e-2000e-17 (1994).

⁹⁹ See LEGAL ACTION CENTER, U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, EMPLOYMENT DISCRIMINATION AND HOW TO DEAL WITH IT: A MANUAL FOR PEOPLE CONCERNED WITH HELPING FORMER DRUG ABUSERS 2 (1977).

¹⁰⁰ See, e.g., *id.*; *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

¹⁰¹ 414 F. Supp. 277 (S.D.N.Y. 1976). It is important, however, to note that the original opinion, reported at 399 F. Supp. 1032 (S.D.N.Y. 1975), did not reach the Title VII issue because the court found that the blanket exclusion of individuals addicted to heroin, who were in methadone maintenance rehabilitation programs, violated the Fourteenth Amendment's Equal Protection and Due Process clauses. See *Beazer v. New York City Transit Auth.*, 399 F. Supp. 1032, 1058-59 (S.D.N.Y. 1975). The opinion that decided the Title VII issue, reported at 414 F. Supp. 277 (S.D.N.Y. 1976), was a supplemental opinion issued almost a year later. The supplemental opinion was in response to the plaintiff's active pursuit of the Title VII claim in order to collect attorney's fees. See *Beazer v. New York City Transit Auth.*, 558 F.2d 97, 99 (2d Cir. 1977). The court of appeals affirmed the lower court's decision without reaching the Title VII issue, noting that the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988(b) (1994), permits a court to allow a prevailing party attorney's fees in § 1983 claims. See *Beazer*, 558 F.2d at 99-100. Subsequently, the Supreme Court reversed the holding of the district court on the Title VII issue. See *Beazer v. New York City Transit Auth.*, 440 U.S. 568, 571 (1979). The Supreme Court's opinion is discussed in detail in the text accompanying notes 110-114.

rehabilitation of individuals addicted to heroin.¹⁰² The four named plaintiffs in *Beazer* were minorities who had been "subject to dismissal or rejection as to employment by the [New York Transit Authority] on the ground of present or past participation in methadone maintenance programs," for heroin addiction.¹⁰³

The *Beazer* plaintiffs included those who were not completely rehabilitated from drug addiction and were using a synthetic narcotic (methadone) while they were employed or sought to be employed by the transit authority¹⁰⁴—immediately distinguishing this case from the scenario presented in this Note. Because some plaintiffs were not already rehabilitated, they may not have met the requirements of bringing an action under the Rehabilitation Act or the ADA,¹⁰⁵ even if those two statutes existed in their present form at the time of *Beazer*.¹⁰⁶

On the Title VII issue, the district court accepted the disparate impact theory of the plaintiffs.¹⁰⁷ The plaintiffs showed that "[b]etween 62% and 65% of methadone maintained persons in New York City are black and Hispanic . . ."¹⁰⁸ The court concluded, "[T]he policy . . . has been shown to have a substantially greater impact on minority groups than on whites. Since the policy is not grounded in any business necessity, it violates Title VII."¹⁰⁹

Although the Supreme Court reversed,¹¹⁰ it clearly limited its holding to *current* users of drugs.¹¹¹ The Court, noting that "[a] policy excluding all *former* users would be harder to justify than a policy applicable only to persons currently receiving treatment,"¹¹² acknowledged that it was not deciding whether or not the blanket denial of individuals who have been addicted to drugs would violate Title VII if applied to those individuals who were completely rehabilitated from their addiction.¹¹³ The rehabilitated individual could also show that he or she no

¹⁰² See *Beazer*, 399 F. Supp. at 1036.

¹⁰³ *Id.* at 1035.

¹⁰⁴ See *id.*

¹⁰⁵ See *infra* Part V.

¹⁰⁶ The ADA was not passed until 1990 and the Rehabilitation Act has been amended significantly since its initial passage.

¹⁰⁷ See *Beazer*, 414 F. Supp. at 279.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* Finding, under a Fourteenth Amendment analysis in the earlier decision, that the transit authority's regulation was not rationally related to their employment needs, the court concluded that it was also not grounded in a business necessity for purposes of Title VII. See *id.* at 278.

¹¹⁰ See *Beazer v. New York City Transit Auth.*, 440 U.S. 568, 571 (1979).

¹¹¹ See *Beazer*, 440 U.S. at 572 n.3.

¹¹² *Id.* (emphasis added).

¹¹³ See *id.* The Court noted that the Rehabilitation Act, which had been recently

longer uses drugs and should not legitimately be considered a safety hazard. Justices White and Marshall made an important point in dissent regarding job-relatedness: They explained that the denial of employment to the plaintiffs could not be considered job-related without *extensive study* of the relationship between an employer's blanket denial policy and job performance ability.¹¹⁴ Any qualification requiring a drug-free history should not be considered "job-related" based merely on the employer's conjecture. Generalities regarding *what is possible* should give way to *what is probable in light of the applicant's individual circumstances*. If employers can not show that the rehabilitated applicant poses a safety hazard or direct threat, courts should reject the assertion that the qualification is job-related.

In sum, the Court has yet to foreclose Title VII challenges to policies that deny employment to rehabilitated drug addicts. Therefore, minority applicants for public safety officer positions, who are no longer using drugs, should be encouraged to bring such challenges.

V. THE LEGALITY OF EXCLUSION UNDER THE DISABILITY DISCRIMINATION STATUTES

Currently, the most powerful tools to challenge the denial of employment to individuals who have been rehabilitated from drug addiction are the Americans with Disabilities Act of 1990¹¹⁵ and the Rehabilitation Act of 1973.¹¹⁶ Congress's enactment of the ADA and the Rehabilitation Act sent a clear message—discrimination against individuals with disabilities, especially when

amended, "arguably includes former drug abusers [in its protections]." *Id.* at 579. Unfortunately, however, some commentators have ignored the Court's attempt to limit its holding to current drug users. See Marvin Hill, Jr. & Emily Delacenserie, *Procrustean Beds and Draconian Choices: Lifestyle Regulations and Officious Intermeddlers—Bosses, Workers, Courts, and Labor Arbitrators*, 57 MO. L. REV. 51, 95 (1992) ("Employees whose lifestyle resulted in a drug or alcohol problem have little or no recourse under Title VII.").

¹¹⁴ See *Beazer*, 440 U.S. at 598–602 (White, J., and Marshall, J., dissenting); cf. Julia Lamber, *Alternatives to Challenged Employee Selection Criteria: The Significance of Nonstatistical Evidence in Disparate Impact Cases under Title VII*, 1985 WIS. L. REV. 1, 24–25 ("[T]he [*Beazer*] Court may have upheld the Transit Authority's blanket exclusion because it recognized the Authority's public image as a legitimate, *although not job-related*, interest of the employer . . . One may certainly question whether an interest in image is a legitimate reason to sustain a rule that adversely affects blacks and Hispanics.") (emphasis added) (footnotes omitted); Andrew Ayers Martin, Note, *Title VII Discrimination in Biochemical Testing for AIDS and Marijuana*, 1988 DUKE L.J. 129, 144–45 ("Arguably, the plaintiffs did not establish a prima facie claim of disparate impact, and the Court did not formally address the issue of proving the job-relatedness of the policy.").

¹¹⁵ 42 U.S.C. §§ 12101–12213 (1994).

¹¹⁶ 29 U.S.C.A. §§ 701–796 (1999).

based on stereotypes, prejudices, and irrational fears, violates the laws and public policies of the nation.¹¹⁷

One of the purposes of the Rehabilitation Act is "to ensure that the Federal Government plays a leadership role in promoting the employment of individuals with disabilities . . . and in assisting States and providers of services in fulfilling the aspirations of such individuals with disabilities for meaningful and gainful employment."¹¹⁸ The Act fulfills its purpose by prohibiting employment discrimination against individuals with disabilities. The Rehabilitation Act, however, applies only to the federal government and all entities receiving federal funds.¹¹⁹

Much like the Rehabilitation Act, one of the purposes of the ADA is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."¹²⁰ Congress determined that in spite of the Rehabilitation Act and improvements in the treatment of disabled individuals, discrimination "continue[s] to be a serious and pervasive social problem."¹²¹ The ADA was enacted to extend the coverage of the Rehabilitation Act and redress the problems of that Act.¹²² The ADA extends the prohibition against disability discrimination to virtually all private and public employers.¹²³ The ADA specifically applies to all state and local governments, regardless of whether or not they receive federal funds.¹²⁴ Therefore, an individual who was

¹¹⁷ See H.R. REP. NO. 101-485(II), at 30, *reprinted in* 1990 U.S.C.C.A.N. 303, 311 ("Discrimination against people with disabilities also includes adverse actions taken against individuals with histories of a disability Such discrimination often results from false presumptions, generalizations, misperceptions, patronizing attitudes, ignorance, irrational fears, and pernicious mythologies.").

¹¹⁸ 29 U.S.C.A. § 701(b)(2).

¹¹⁹ See *id.* § 794(a).

¹²⁰ 42 U.S.C. § 12101(b)(1); see also *Tenbrink v. Federal Home Loan Bank*, 920 F. Supp. 1156, 1160 (D. Kan. 1996).

¹²¹ 42 U.S.C. § 12101(a)(2).

¹²² See *Hutchinson v. United Parcel Service, Inc.*, 883 F. Supp. 379, 387 (N.D. Iowa 1995).

¹²³ See 42 U.S.C. § 12111(5) (defining "employer" as "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year").

¹²⁴ See *id.* § 12132 (1994) (Title II of the ADA) ("Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."); see also Martin Schiff, *The Americans with Disabilities Act, Its Antecedents, and Its Impact on Law Enforcement Employment*, 58 MO. L. REV. 869, 873 n.11 (1993) (Quoting 56 Fed. Reg. 35694 (1991), the author notes "[b]ecause Title II of the ADA essentially extends the

denied employment as a public safety officer by a state or local governmental entity because of his or her previous drug addiction could bring action under both statutes.

Any analysis of the legality of disqualifying individuals with drug addiction histories from public employment must begin with the statutory language of these anti-discrimination statutes.¹²⁵ The general provision against employment discrimination found in the Rehabilitation Act (and similarly in the ADA¹²⁶) states that “[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”¹²⁷ State and local governments, including law enforcement agencies and other civil service agencies, are explicitly included in this provision because the term “program or activity” is defined to mean “all the operations of . . . a department, agency, special purpose

nondiscrimination mandate of [the Rehabilitation Act] to those State and local governments that do not receive Federal financial assistance, this rule hews closely to the provisions of existing 504 regulations . . .”). *See generally* Mark C. Weber, *Disability Discrimination by State and Local Government: The Relationship Between Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act*, 36 WM. & MARY L. REV. 1089 (1995).

¹²⁵ The importance of looking first to the statute’s text when interpreting its meaning has been advocated by the Supreme Court on many occasions. *See, e.g.,* *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 508–09 (1989) (explaining that only when the text of a statute is ambiguous should one turn to other sources for guidance).

¹²⁶ The general provision of the ADA applicable to state and local governments states that “[s]ubject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, . . . be subjected to discrimination by any such entity.” 42 U.S.C. § 12132 (Title II of the ADA); *see also* Schiff, *supra* note 124, at 873 n.11 (noting “[b]ecause Title II of the ADA essentially extends the nondiscrimination mandate of [the Rehabilitation Act] to those State and local governments that do not receive Federal financial assistance, this rule hews closely to the provisions of existing 504 regulations”). *See generally* Weber, *supra* note 124. Because the ADA provision specifies that other sections of the Act apply to state and local governments as well, one can also look to the general discrimination provisions of the ADA for clarification. The general discrimination provision of the ADA states:

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a) (made applicable to all state and local entities by Title II, 42 U.S.C. § 12132).

¹²⁷ 29 U.S.C.A. § 794(a) (1999).

district, or other instrumentality of a State or of a local government.”¹²⁸

All individuals with drug addiction histories who apply for public safety officer positions would have to initially demonstrate that they had a disability, had a record of a disability, or were regarded as having a disability,¹²⁹ and were qualified for the position in question. Because of the common recognition of drug addiction as a disability and Congressional treatment of addiction as such (as explained in Part III.D above) an individual who was addicted to drugs should have little difficulty meeting the threshold showing that he or she had a disability.¹³⁰ The Second Circuit recently explained that if a person establishes past addiction, he or she will “*automatically* be covered under [the statutes] for having a record of drug addiction” as long as the individual is not currently using drugs.¹³¹ The confusion among employers and applicants typically rests, instead, in the second initial requirement—showing the applicant is qualified for the job in question.

In scenarios like those presented in this Note, proving the rehabilitated applicant’s qualification should not be difficult because the applicant was already placed on the eligibility list for the position. Many state and local governments place qualified individuals on initial eligibility lists before conducting a background check,¹³² the background check being the main vehicle for employers to inquire about drug addiction history. Placement on an eligibility list is often considered *prima facie* evidence that the applicant was qualified.¹³³

¹²⁸ *Id.* § 794(b)(1)(A).

¹²⁹ See *Fussell v. Georgia Ports Auth.*, 906 F. Supp. 1561, 1567 (S.D. Ga. 1995) (“Establishing that one is disabled is the cornerstone to an ADA plaintiff’s *prima facie* case.”).

¹³⁰ See, e.g., *Buckley v. Consolidated Edison Co. of New York*, 127 F.3d 270, 273 (2d Cir. 1997) (holding that an individual with a history of drug addiction had a disability for the purposes of the ADA and that drug addiction “substantially limits one or more . . . major life activities”). Note, however, that past drug *abuse* would be insufficient for an individual to claim protection under the ADA and Rehabilitation Act. The individual would have to claim he or she was addicted in order to be “disabled” for purposes of the statutes. See *id.* at 273; *Johnson v. St. Clare’s Hosp. & Health Ctr.*, No. 96 Civ. 1425 (MBM), 1998 WL 213203, at *6 (S.D.N.Y. Apr. 30, 1998) (“To qualify for this protection [as an individual with a disability], a person must show that he was actually addicted to alcohol or drugs in the past—as opposed to having been a casual user of either substance . . .”).

¹³¹ See *Buckley*, 127 F.3d at 273 (emphasis added); *Johnson*, 1998 WL 213203, at *6 (“In other words, a recovering alcoholic [or drug addict] need not show that one or more of his major life activities is currently impaired by alcohol [or drug] use in order to be protected from discrimination . . .”).

¹³² See, e.g., *Thorne v. City of El Segundo*, 726 F.2d 459, 462 (9th Cir. 1983).

¹³³ See, e.g., *Colorado Civil Rights Comm’n v. North Washington Fire Protection Dist.*, 772 P.2d 70, 79–80 (Colo. 1989) (noting that disabled firefighter applicants established they were “otherwise qualified” because they scored well enough on written, oral, and strength and

Indeed, it would be absurd and contrary to the very concept of an eligibility list if truly unqualified individuals were ever named "eligible."

More importantly, however, there are specific provisions of the Rehabilitation Act and the ADA that deal specifically with the qualifications of individuals who have been rehabilitated from drug addiction.¹³⁴ Although "an individual who is *currently* engaging in the illegal use of drugs" is not protected by the statutes,¹³⁵ an individual who has been rehabilitated may not be deemed *unqualified* because of his or her drug addiction history.¹³⁶ Therefore, employers

agility tests to be placed on eligibility list despite their physical deficiencies); *Dalton v. Village of Palatine*, No. 95-C-4154, 1997 WL 189301, *3 (N.D. Ill. Apr. 15, 1997) ("[S]he was qualified for the position as she made the eligibility list"); *Bouman v. Pitchess*, Civ. A. No. CV 80-1341-RMT (Px), 1985 WL 9428, *5 (C.D. Cal. 1985) ("[S]he was qualified for the promotion by virtue of her ranking on the eligibility list."); *Herron v. City of Chicago*, 619 F. Supp. 767, 771 (N.D. Ill. 1985) ("[Plaintiffs] were rated qualified and placed on the eligibility list"); *Arthur v. Nyquist*, 712 F.2d 816, 818 (2d Cir. 1983) ("[A]ppointments . . . must be made from an eligibility list containing the names of all qualified applicants"); *Bolden v. Pennsylvania State Police*, 73 F.R.D. 370, 373 (E.D. Pa. 1976) ("The defendant Pennsylvania State Police shall establish an eligibility list of qualified applicants for hiring for each State Police Academy class"); *Pennsylvania v. O'Neill*, 348 F. Supp. 1084, 1104 (E.D. Pa. 1972) ("[I]ndividuals on existing eligibility lists are properly qualified for appointment or promotion as the case may be."); *United States v. City of St. Louis*, No. 74-200 C (3), 1977 WL 27, at *1 (E.D. Mo. Oct. 21, 1977) ("All black applicants who were placed upon the eligibility list for Fire Captain . . . shall be deemed qualified"); *Leen v. Carr*, 945 F. Supp. 1151, 1153 (N.D. Ill. 1996) ("If an applicant is deemed 'qualified,' his or her name is placed on an eligibility list.").

¹³⁴ See 29 U.S.C.A. § 794(a) (1999) ("No *otherwise qualified* individual with a disability . . . shall, solely by reason of her or his disability . . . be subjected to discrimination") (emphasis added); 42 U.S.C. § 12132 (1994) ("No qualified individual with a disability shall, by reason of such disability, . . . be subjected to discrimination"); see also *Leary v. Dalton*, 58 F.3d 748, 753 (1st Cir. 1995) (explaining that under the Rehabilitation Act, the plaintiff must show she or he is qualified for the position).

¹³⁵ 29 U.S.C.A. § 705(20)(C)(i) (1999) (emphasis added); 42 U.S.C. § 12114(a) (1994).

¹³⁶ See 29 U.S.C.A. § 705(20)(C)(ii). The provision of the ADA states:

Nothing in . . . this section shall be construed to exclude as a qualified individual with a disability an individual who—(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use; (2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or (3) is erroneously regarded as engaging in such use, but is not engaging in such use.

42 U.S.C. § 12114(b).

Note that from the above language an employer does not have to provide the applicant with an opportunity for rehabilitation; "[a]ddicts already must be rehabilitated or in rehabilitation at the time their employers take adverse action against them." *Henderson, supra*

could only deny employment to an individual if they could show that the applicant was *currently* using illegal drugs.¹³⁷

Looking at the language protective of rehabilitated drug users in the context of the whole statute also shows Congress's intent not to allow any employer to use history of drug addiction to disqualify an applicant.¹³⁸ Although understanding employers' concerns with hiring individuals with drug histories,¹³⁹ Congress drew a clear line between the lawful consideration of drug use and the unlawful discrimination against those with drug-related disabilities. Congress explicitly provided authority to employers to discipline drug users.¹⁴⁰ The employer, for example, can prohibit the use of drug and alcohol in the workplace and provide drug testing of employees to ensure compliance with the laws regulating drug abuse.¹⁴¹ One could therefore assume that, because Congress provided specific authority for employers to deny employment to *current* drug users, included a section that explicitly protected *rehabilitated* drug addicts, and nowhere made exceptions for state and local public safety officer positions, Congress intended to protect rehabilitated individuals who apply for public safety officer positions.

Even those critical of the effects that this protection may have on law enforcement agencies agree that the statutes plainly prohibit *all* employers from discriminating on the basis of drug addiction history when the applicant is not currently using drugs. For example, one commentator explained:

note 19, at 733 n.160 (citing S. REP. NO. 101-116, at 41-42 (1989)). Note also that, under § 12114(b)(3), the individual who has been rehabilitated from drug addiction would not be excluded from protection if the employer erroneously believed him or her to be currently engaging in drug use.

¹³⁷ The applicant would be considered "currently engaging in" the use of drugs if "they have used drugs recently enough to support a reasonable belief that their drug use is 'current.'" Henderson, *supra* note 19, at 733 n.157 (citing H.R. CONF. REP. NO. 101-558, at 60 (1990)). Congress made its intent clear that this "currently engaging in" standard was not to exclude those who have histories of drug use but are no longer engaged in this activity. *See* H.R. REP. NO. 101-485(II), at 77 (1990), *reprinted in* 1990 U.S.C.C.A.N. 360. To ensure that the applicant is no longer using drugs, employers can perform drug testing on applicants. *See, e.g.*, 42 U.S.C. § 12114(b). For a detailed discussion of pre-employment drug testing, see L. CAMILLE HÉBERT, *EMPLOYEE PRIVACY LAW* § 3.09 (1993 & Supp. 1997).

¹³⁸ The Court has often said that one way to interpret the intent of a statute is to read the applicable section in the context of other sections. *See, e.g.*, *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) ("When interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute . . .").

¹³⁹ *See supra* note 31 and accompanying text.

¹⁴⁰ *See* 42 U.S.C. § 12114 (c)-(e).

¹⁴¹ *See id.* For comparable provisions of the Rehabilitation Act, see 29 U.S.C. § 705(20)(C)(ii) (1999).

Perhaps the foremost problem for law enforcement under the ADA is that, even though a drug addict need not be employed, a drug abuser who deems himself rehabilitated would have to first be hired conditionally as a police officer, and then the police department would have the burden of establishing that he was still abusing drugs in order to show that he was not qualified.¹⁴²

Although this statement was made to illustrate the opinion that the protection offered by the statutes is detrimental to public employers, the commentator's interpretation of the ADA (which would also apply to the Rehabilitation Act) must be correct when one considers the language of the statute.¹⁴³

¹⁴² Schiff, *supra* note 124, at 900; see also Sally Gross-Farina, Comment, *Fit for Duty? Cops, Choirpractice, and Another Chance for Healing*, 47 U. MIAMI L. REV. 1079, 1118 (1993) ("A literal reading demands the conclusion that an employer cannot discriminate against a cocaine addict who is rehabilitated . . . as long as that person is not *currently* using drugs.") (emphasis in original); Thomas P. Murphy, *Disabilities Discrimination Under the Americans with Disabilities Act*, 36 CATHOLIC LAW. 13, 22 (1995) (noting that a parochial school could not discriminate against an individual who has a history of drug addiction when that person applies for a teaching position); Bonnie P. Tucker, *The Americans With Disabilities Act Interpreting The Title I Regulations: The Hard Cases*, 2 CORNELL J.L. & PUB. POL'Y 1, 18-19 (1992) ("A more troubling scenario is a . . . policy that simply prohibits former drug abusers from serving as police officers. . . . Since former drug addiction is a protected status under the ADA, the [employer] may have violated the ADA by discriminating solely on that status.").

¹⁴³ It is also interesting to realize, although this Note does not cover applicants for *federal* law enforcement positions, that the FBI has recently changed its policy regarding individuals with histories of drug abuse. On March 7, 1994, the director of the FBI announced that applicants with histories of drug abuse would no longer be automatically excluded from consideration for FBI employment. See *FBI to Give Polygraph Tests for Drug Use to Agency Job Applicants, Director Freeh Says*, Daily Lab. Rep. (BNA), Mar. 10, 1994, at 46 d10 [hereinafter *Polygraph Tests*]. The FBI, however, insisted that this new policy does not condone prior unlawful drug use and is even more stringent than the former policy of blanket exclusion for all previous drug users (except those who experimented with marijuana) because it now requires applicants to undergo polygraph testing about such use. See *id.* The stated purpose of the new policy is "to set forth guidelines for determining whether an applicant's prior use makes him/her unsuitable for employment, balancing the needs of the FBI to maintain a drug-free workplace and the public integrity necessary to accomplish its law enforcement mission with the desirability of affording the opportunity of employment to the broadest segment of society. . . ." *Id.*; cf. In re Petition and Questionnaire for Admission to Rhode Island Bar, 683 A.2d 1333, 1367 (R.I. 1996) (finding that inquiries about drug histories on bar applications violates the law); Lanny King, Note, *The Kentucky Board of Bar Examiners' Character and Fitness Certification Questionnaire: Are Mental Health Inquiries a Violation of the Americans with Disabilities Act?*, 84 KY. L.J. 685, 697-704 (1996) (discussing a state by state approach to the issue of questions on bar applications dealing with applicants' drug abuse histories).

VI. THE ESSENTIAL FUNCTION DEBATE

The determination that an individual with a drug addiction history is disabled for purposes of the ADA and Rehabilitation Act, and that an applicant cannot be disqualified for a position based on this history does not end the analysis. An employer could lawfully disqualify an individual with a history of drug addiction if it were shown that the individual could not perform the essential function of the position (or that the employer's reliance on the individual's disability was consistent with a business necessity). State and local entities often attempt to disqualify an applicant with a history of drug addiction by arguing that she or he cannot perform one of the essential functions of the job.

The regulations specify that the determination of the position's essential functions can be made after considering, among other things, the belief of the employer as to what functions are essential, the written job description prepared before interviewing the applicant, and the amount of time the employee will spend performing the function.¹⁴⁴ For example, one commentator has stated that the essential functions of a police officer position "are grounded in the traits expected of a police officer: good character, as manifested, in part, by the absence of a record of criminal arrests and drug use"¹⁴⁵

Although employers play a major role in the determination of what functions are essential, the Supreme Court has stated that such employer determinations of essential functions should not be too readily assumed to be valid: "It is possible to envision situations where an insistence on continuing past requirements and practices might arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program."¹⁴⁶ As discussed below, notwithstanding the statute's deference to employer's determinations of a job's "essential functions," it is difficult to imagine a legally sufficient justification for the blanket denial of public safety officer employment due to the applicant's drug addiction history.

A. Justifications for Drug History Qualifications

Public employers most often justify their policies of excluding individuals with drug addiction histories based on the notion that morality is an essential function or business necessity for public safety officer positions. And as mentioned in Part III.C, most laws and regulations on the subject of drug addiction history are linked to the concept of moral character. Indeed, it is no

¹⁴⁴ See 29 C.F.R. § 1630.2(n)(3) (1998).

¹⁴⁵ Schiff, *supra* note 124, at 902.

¹⁴⁶ *Southeastern Community College v. Davis*, 442 U.S. 397, 412 (1979).

surprise that good moral character is a desirable trait for public safety officers;¹⁴⁷ good character and trustworthiness are important to any employer in the public or private sector. What an individual has done in his or her past, especially when it is something as taboo as drug addiction,¹⁴⁸ is often seen, rightly or wrongly, to be conclusive of what he or she will do in the future. Consider this opinion from an expert on police officer selection standards made in 1955:

An Established reputation for good moral character is, without a doubt, the most important element in the preliminary qualification of the police officer. In addition to the temptations and corrupting influences surrounding the performance of the police duty, which are of a nature to test the moral fiber of any man, the police officer is required to enforce laws and ordinances establishing a certain standard of personal and social conduct. If he or she is to be a reliable public agent, then he or she must be in general accord with the policies which such laws represent. Perhaps the best indication of this is the applicant's own past record in the community and his attitude toward society.¹⁴⁹

¹⁴⁷ One former officer noted that "[m]orality...is inextricably a facet of law enforcement, and a police officer's character is the key to his or her success." RICKEY D. LASHLEY, *POLICEWORK: THE NEED FOR A NOBLE CHARACTER* 4 (1995).

¹⁴⁸ For an interesting explanation of drug addiction as societal taboo, see Jacob Sullum, *Voodoo Social Policy: Exorcising the Twin Demons, Guns and Drugs*, REASON, Oct. 1994, at 26. Sullum notes:

[T]he history of drug prohibition is filled with warnings that reflect a fear of losing control, of being taken over by an outside force. If you smoke marijuana, you will chop up your family. If you take LSD, you will jump out a window. If you inject heroin, you will burglarize homes. If you smoke crack, you will have sex with animals.

Id. at 31. Sullum also suggests why this societal taboo persists: "[R]espectable, productive people are understandably reluctant to stand up and say, 'I use illegal drugs, and I'm a pillar of the community. . . . In some ways it is safer to acknowledge one's homosexuality than to reveal a history of illegal drug use.'" Jacob Sullum, *Drugs and Deviance*, Speech at the Libertarian Convention in Columbus, Ohio (May 1995) (transcript available at <<http://www.reason.com/speeches/LP.html>>) [hereinafter Sullum, *Drugs and Deviance*]. If Sullum's sense is correct, it is rather ironic considering that individuals who have overcome drug addiction are protected by federal discrimination statutes, whereas gays and lesbians are not.

¹⁴⁹ JAMES A. CONSER & ROGER D. THOMPSON, *POLICE SELECTION STANDARDS AND PROCESSES IN OHIO: AN ASSESSMENT* 161 (1976) (quoting Thomas M. Frost, *Selection Methods for Police Recruits*, 46 J. CRIM. L., CRIMINOLOGY, & POLICE SCI. 135-45 (1955)); see also *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 524 A.2d 430, 431 (N.J. Super. Ct. App. Div. 1987) (Noting the importance of public perception of police officers, the court in this drug testing case quoted the words of the local police director: "Police Officers should bear in mind that they symbolize the dignity and authority of the Law. It is a harsh reality that we, as Police Officers, must maintain standards of conduct that are above that which

This opinion has been, without a doubt, adopted by many state and local governments. For example, the preface to the Columbus, Ohio civil service regulations for police officers and firefighters illustrates the implementation of this widely held belief:

The purpose of the background investigation is to determine whether an applicant...has demonstrated respect for the law and the rights of others....The public demands a high level of integrity with respect to firefighters and law enforcement officers. It is important to keep in mind that Columbus police officers and firefighter applicants are held to a higher standard than other applicants.¹⁵⁰

Some public safety officer employers may also support the exclusion of individuals who have been addicted to drugs because of the effect on co-worker morale that may result when it is discovered that the agency has employed a former drug addict.¹⁵¹ The resulting morale problems could be the result of either prejudice, fears, or stereotypes regarding the rehabilitated individual or the perception that the individual is receiving special treatment.¹⁵² The EEOC has been very reluctant to allow such justifications for any employer policy that would result in the discrimination against individuals with disabilities.¹⁵³

Other justifications appear to be much more job related and, therefore, much more persuasive. One such justification is related to public safety.¹⁵⁴ Public employers may argue that the risks posed by an individual with a history of drug addiction in the position of public safety officer are severe when one considers the frequency of relapse.¹⁵⁵ It has also been noted that there would be credibility

is expected of the average citizen in order that we maintain the confidence and trust of the public that we serve.”); Michael J. Sipes, Letter to the Editor, *On-Job Temptations Too Great to Let Ex-Users on Police Force*, DAYTON DAILY NEWS, Apr. 12, 1997, at 12A.

¹⁵⁰ COLUMBUS CIVIL SERVICE COMMISSION, *supra* note 48 (emphasis in original).

¹⁵¹ See Lisa E. Key, *Co-Worker Morale, Confidentiality, and the Americans With Disabilities Act*, 46 DEPAUL L. REV. 1003 (1997).

¹⁵² See *id.* at 1009.

¹⁵³ See *id.* at 1032–33 (quoting the EEOC’s technical assistance manual as stating: “an employer may not claim undue hardship solely because providing an accommodation has a negative impact on the morale of other employees”).

¹⁵⁴ An example of the public safety rationale offered by state and local entities can be found in *Capua v. City of Plainfield*, 643 F. Supp. 1507 (D.N.J. 1986). In this case, however, the court rejected the argument by explaining: “The threat posed by the widespread use of drugs is real and the need to combat it manifest. But it is important not to permit fear and panic to overcome our fundamental principles and protections.” *Id.* at 1522. This concept may be tied to the “Direct Threat” defense in the ADA. See 42 U.S.C. § 12111(3) (1994); 29 C.F.R. § 1630.2(r) (1998).

¹⁵⁵ For a discussion about the factors contributing to the high incidence of relapse, see

and impeachment problems when rehabilitated police officers were called upon to testify in criminal proceedings.¹⁵⁶ Along the same lines, public employers may argue that hiring individuals with drug addiction histories would compromise the public confidence in the entity's image and integrity.¹⁵⁷ Although many courts would probably be sympathetic to these proposals, other courts have questioned whether or not this is sufficiently related to the performance of the job to justify the discrimination against individuals with disabilities. For example, one court has stated: "Clearly, no one can deny that the public has a interest in the integrity of its fire fighting forces. Yet, the ability of fire fighters to perform their jobs is not dependent upon the public's 'perception' of this integrity In other words, fire fighters can still continue to serve the public effectively, even in the face of unpopular public 'perception.'" ¹⁵⁸

State and local employers may also argue, especially with regard to positions in law enforcement, that an essential function of a police officer is a role model for the community. Some believe this function cannot be performed if the individual has a history of drug addiction. Related to this claim is the assertion that an essential function of a public safety officer position is a respect for the law and that the applicant's past addiction to illegal drugs demonstrates a disrespect for the law. However, this role model "function" may not be damaged by a person who has overcome a difficult disease such as drug addiction. Such an individual could be a powerful voice of the dangers of drug use and addiction as well as the availability and success of drug rehabilitation programs.

PETERS, *supra* note 18, at 74-82.

¹⁵⁶ See Carl T. Rowan, Jr., *D.C. Confidential: The Lawless Lawmen of Our Nation's Capital*, THE NEW REPUBLIC, Jan. 19, 1998, at 20 ("[T]he local equivalent of the [D.C. District Attorney's Office] maintains a list of more than 300 cops whose backgrounds are so tainted . . . that they cannot testify in court because defense attorneys would easily impeach their testimony."). Keith Alan Byers also writes:

[A] law enforcement agency could argue that a past record of drug addiction should be disqualifying because of any of the following reasons: The individual's previous record of repeated illegal behavior directly conflicts with the very nature of law enforcement; various risks and temptations could result from permitting the individual to investigate drug offenses; and the credibility and impeachment problems that would arise whenever the individual might testify in criminal proceedings.

Keith Alan Byers, *No One is Above the Law When it Comes to the ADA and the Rehabilitation Act—Not Even Federal, State, or Local Law Enforcement Agencies*, 30 LOY. L.A. L. REV. 977, 1018 (1997).

¹⁵⁷ See, e.g., *Beazer v. New York City Transit Auth.*, 440 U.S. 568 (1979); *Capua v. City of Plainfield*, 643 F. Supp. 1507 (D.N.J. 1986); *Grimes v. United States Postal Service*, 872 F. Supp. 668 (W.D. Mo. 1994).

¹⁵⁸ *Capua*, 643 F. Supp. at 1521.

Whether expressed as respect for the law, absence of moral turpitude, or an attempt to strengthen the public's confidence in the authorities, government justifications for drug history qualifications boil down to an attempt to preserve what is seen as a proxy for moral character and a predictor of the applicant's future job performance. The use of drug addiction history in this way, however, is not based on the individualized determination that the law requires;¹⁵⁹ it is stereotyping,¹⁶⁰ which would not be permitted (and rightly so) in regard to other characteristics. Furthermore, public employers' use of drug addiction histories does not take into account their ability to take other measures—such as drug testing—to ensure that the individual is not currently using drugs.¹⁶¹

B. *Who Will Prevail?*

Based on the prevalence of the regulations disqualifying former drug addicts and the lack of cases that have challenged these regulations, it would appear that many are confident that public employers would prevail if challenged about such practices. Indeed, the EEOC regulations state: "An employer, such as a law enforcement agency, *may* also be able to impose a qualification standard that excludes individuals with a history of illegal use of drugs if it can show that the standard is job-related and consistent with business necessity."¹⁶² Importantly, however, the EEOC also recognizes that employers may not use the "business necessity" defense if an applicant with a drug addiction history has an "extensive period of successful performance."¹⁶³

The EEOC regulation that seems to permit the use of drug addiction history qualifications, however, may not be supported by the statutes. The legislative history of the ADA, for example, explains: "Decisions are not permitted to be based on generalizations about the disability but rather must be based on the facts of an individual case."¹⁶⁴ A qualification standard based on history of illegal

¹⁵⁹ "Decisions are not permitted to be based on generalizations about the disability but rather must be based on the facts of an individual case." H.R. REP. NO. 101-485, (III), at 45 (1990), *reprinted in* 1990 U.S.C.C.A.N.445, 468.

¹⁶⁰ *See, e.g.,* Sullum, *Drugs and Deviance*, *supra* note 148 ("The stereotypes do not deal with averages or probabilities. They make sweeping generalizations: if you use illegal drugs, you must be a hippie, a criminal, an outcast, a leech.").

¹⁶¹ *See* 42 U.S.C. §§ 12114(b) (1994); 29 C.F.R. § 1630.3(c) (1998).

¹⁶² 29 C.F.R. App. § 1630.3 (1998) (*emphasis added*). The regulation only mentions law enforcement agencies, but municipalities have often extended this qualification to firefighters and other public safety officers. *See supra* Part III.C.

¹⁶³ Tucker, *supra* note 142, at 19–20 (citing TECHNICAL ASSISTANCE MANUAL, *supra* note 18, at § 8.7).

¹⁶⁴ H.R. REP. NO. 101-485(III), at 45 (1990), *reprinted in* 1990 U.S.C.C.A.N. 468.

drug use, like the one approved by the EEOC for police officers, nullifies this individualized determination and undermines the purposes of the ADA and Rehabilitation Act.¹⁶⁵

Contradictory statements on this topic do not end with the regulations and legislative history. Although the Supreme Court has never dealt with this issue, the few lower courts that have come close to this topic have been inconsistent.¹⁶⁶ Recognizing this inconsistency, one commentator noted:

There is very little precedent concerning protections for persons who erroneously are regarded as drug abusers or who are recovering drug abusers. Although courts may find precedent helpful when considering cases involving alcoholism, there is little guidance for courts when prior or perceived drug abuse is involved. Furthermore, the regulations and legislative history provide virtually no guidance on either of these issues. For these reasons, the EEOC and the courts will be required to create their own standards for determining the scope of protection under the ADA for persons with alcoholism or persons who have, or who are regarded as having, abused drugs.¹⁶⁷

After looking at some of the courts' opinions, one thing is certain—no one could currently sum up a definitive stance or predict future holdings.¹⁶⁸

Some courts have shown their reluctance to allow the disqualification of an individual because of a history of drug use. For example, in *Johnson v. Smith*,¹⁶⁹ the court would not defer to the defendant's assertions that a drug-free history was necessary for a corrections officer.¹⁷⁰ Similarly, in *Nisperos v. Buck*,¹⁷¹ the

¹⁶⁵ See, e.g., Tucker, *supra* note 142, at 9 (noting that some EEOC regulations should be invalid from a policy perspective and explaining that the "basic premise of the ADA is to eliminate 'overprotective rules and policies' that have the effect of discriminating against persons with disabilities.") (citation omitted).

¹⁶⁶ This inconsistency is magnified by the facts of the individual cases, which often present issues of the applicant's *recent* conduct or drug use. See, e.g., *Copeland v. Philadelphia Police Dep't*, 840 F.2d 1139 (1988).

¹⁶⁷ Barbara A. Lee, *Reasonable Accommodation Under the Americans with Disabilities Act: The Limitations of Rehabilitation Act Precedent*, 14 BERKELEY J. EMP. & LAB. L. 201, 249 (1993).

¹⁶⁸ Many have tried to predict how the courts would treat this issue. For example, one commentator writes that "[i]n most cases it seems very unlikely that a court would disagree with the refusal of a law enforcement agency to employ or accommodate a rehabilitated drug addict." Byers, *supra* note 156, at 1018 (acknowledging, however, that the EEOC apparently disagrees with such an assertion). As this Note demonstrates, however, it is easy to arrive at the opposite conclusion.

¹⁶⁹ 1985 WL 4998, Civ. No. 5-84-131 (D. Minn. Dec. 13, 1985).

¹⁷⁰ See *id.* at *2. Such assertions were that the applicant's drug abuse history showed "weak character, . . . inability to differentiate right and wrong, and susceptibility to

Immigration and Naturalization Service (INS) argued that the plaintiff's drug use disqualified him from consideration for a job as a Department of Justice attorney working for the INS.¹⁷² The INS argued that because its work often involves drug-related issues, employment of an attorney who had previously been arrested for illegal drug use would undermine the agency's integrity.¹⁷³ The court, however, rejected the argument and explained: "[W]hile in the best of all worlds attorneys should not be involved with drugs, defendant must do more than recite broad generalizations to demonstrate that a drug-free history is an 'essential' element of a general attorney's job."¹⁷⁴ According to the court, an employer's interest in a drug-free workplace could only justify termination of an employee *currently* using drugs, but not one with only a history of past drug use.¹⁷⁵ Consistently, other courts have also noted that public employers have less intrusive means of ensuring department integrity by maintaining a drug-free workplace—such as drug testing and workplace supervision.¹⁷⁶

Other examples in accord with these propositions can be found. For example, in *Wallace v. Veterans Administration*,¹⁷⁷ an applicant for a nursing position in the intensive care unit of a local hospital was denied employment because of her drug abuse history.¹⁷⁸ The hospital argued that dispensing of narcotics was an essential function of the nurse position, and, because of plaintiff's history of drug abuse and inability to dispense narcotics, she was not qualified for the position.¹⁷⁹ Noting the language and purpose of the Rehabilitation Act and the employer's burden of proving that the reliance on plaintiff's disability was job-related, the court found that a drug-free history was *not* required for her to perform the job. Such a qualification violated the

manipulation." *Id.* at *1.

¹⁷¹ 720 F. Supp. 1424 (N.D. Cal. 1989) (*aff'd without opinion sub nom.* Nisperos v. McNary, 936 F.2d 579 (9th Cir. 1991)).

¹⁷² *See id.* at 1428.

¹⁷³ *See id.* at 1428–29.

¹⁷⁴ *Id.* at 1429.

¹⁷⁵ *See id.*; *see also* *Ambrosino v. Metropolitan Life Ins. Co.*, 899 F. Supp. 438 (N.D. Cal. 1995) (noting that in the context of a private insurer's termination of participating physician agreement because of physician's history of drug abuse, "[t]his type of differential treatment based upon past addiction, without regard to whether there is any current effect on the previously addicted person's ability to practice his profession competently, has been held to violate the Rehabilitation Act's prohibition of discrimination based on disability") (citations omitted).

¹⁷⁶ *See American Fed'n of Gov't Employees v. United States Dep't of Hous. & Urban Dev.*, 924 F. Supp. 225, 250 (D.D.C. 1996).

¹⁷⁷ 683 F. Supp. 758 (D. Kans. 1988).

¹⁷⁸ *See id.* at 760.

¹⁷⁹ *See id.* at 765–66.

Rehabilitation Act.¹⁸⁰

If a history of drug addiction for a corrections officer, an INS attorney, or an intensive care nurse does not justify discrimination, it is hard to imagine that a drug-free history qualification would be found to be an essential function (or business necessity) of any position—including public safety officer. But other courts have given glimpses of their willingness to uphold public employers' insistence on drug-free histories as a qualification for public safety officer employment. The courts have often been sympathetic to a public employer's image and its ability to preserve the public trust.¹⁸¹ One court has even noted that "moral qualifications" are not necessarily beyond the scope of the Rehabilitation Act.¹⁸² Although the facts of that case dealt with a police officer engaging in drug use while employed, the court's statement could have significant negative impact on rehabilitated individuals; many state and local regulations regarding drug abuse history qualifications are, as noted above, purportedly based on morality.

Another troubling example comes from the same court that was once sympathetic to rehabilitated individuals.¹⁸³ The Eastern District of Pennsylvania stated, in *Desper v. Montgomery County*,¹⁸⁴ that "a [drug] rehabilitation program could not alter the fact that an officer violates the laws he or she is sworn to uphold."¹⁸⁵ The court found that the plaintiff, although completing a rehabilitation program, was not "otherwise qualified" as required by the Rehabilitation Act.¹⁸⁶ Also, in *Hartman v. City of Petaluma*,¹⁸⁷ the court found that a history of past drug use may be used to disqualify an applicant for a city

¹⁸⁰ See *id.* at 767.

¹⁸¹ See, e.g., *Copeland v. Philadelphia Police Dep't*, 840 F.2d 1139 (3d Cir. 1988); *Heron v. McGuire*, 803 F.2d 67 (2d Cir. 1986); *City of Minneapolis v. Moe*, 450 N.W.2d 367 (Minn. App. Ct. 1990); *Tharpe v. City of Newark Police Dep't*, 619 A.2d 228, 230 (N.J. Super. Ct. App. Div. 1992); *Faure v. Chesworth*, 489 N.Y.S.2d 641 (N.Y. App. Div. 1985); *Desper v. Montgomery County*, 727 F. Supp. 959 (E.D. Pa. 1990).

¹⁸² See *Copeland*, 840 F.2d at 1148.

¹⁸³ See *Davis v. Bucher*, 451 F. Supp. 791 (E.D. Pa. 1978) (finding that a blanket refusal to consider individuals with histories of drug addiction for municipal employment violated due process and equal protection).

¹⁸⁴ 727 F. Supp. 959 (E.D. Pa. 1990).

¹⁸⁵ *Id.* at 963. The Court cites *Copeland v. Philadelphia Police Department*, 840 F.2d 1139, 1149 (3d Cir. 1988), as support for this statement without mention that the plaintiff in *Copeland* was a *current* user of illegal drugs. The distinction between current users and rehabilitated users is an important one that should never be overlooked by courts in light of the language of the ADA and Rehabilitation Act.

¹⁸⁶ See *Desper*, 727 F. Supp. at 963.

¹⁸⁷ 841 F. Supp. 946 (N.D. Cal. 1994).

police officer position.¹⁸⁸ Although disqualifying the applicant, the city did *not* state it was doing so because of his drug history but because of his “lack of candor regarding that drug use”¹⁸⁹ (as well as his dishonesty about drug abuse on his employment application.)¹⁹⁰ These facts of the applicant’s misconduct make this case distinguishable from the scenario presented in this Note and illustrate the conduct-versus-status distinction that was explained above.

A look at the principles developed from drug testing cases can also prove useful in this area. In a prominent drug testing case, the Supreme Court declared that the government had a compelling interest in ensuring that certain employees have “unimpeachable integrity and judgment.”¹⁹¹ In another case, the Supreme Court has noted that the government has a compelling interest to allow employers to exclude employees who “under compulsion of circumstances or for other reasons, . . . might compromise sensitive information.”¹⁹² These two statements may, in the future, also justify the exclusion of applicants with drug abuse histories because, as one court noted, those individuals may be vulnerable to “substantial financial pressures, heightened susceptibility to coercion or undue influence, or general unreliability,”¹⁹³ making them a threat to the employer’s interests.

All of these cases would be relied on by both parties in a dispute about the legality of using an applicant’s drug history as an employment qualification. The range of holdings and factual situations makes it difficult to predict what a court would do if such a scenario were presented to it. Certainly, however, the employer seeking to exclude an individual because of his or her drug abuse history must, if challenged, articulate essential functions for the position that are consistent with the purposes of the Rehabilitation Act and the ADA. The employer also has the burden of demonstrating business necessity if that affirmative defense is available. These burdens in themselves and the unsettled nature of this area of law make legal challenges to such employer practices worthwhile.¹⁹⁴

¹⁸⁸ See *id.* at 950.

¹⁸⁹ *Id.* at 947.

¹⁹⁰ See *id.* at 949.

¹⁹¹ *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 670 (1989) (upholding U.S. Customs Service’s drug testing policy for front line drug interdiction personnel because of the threats of having current drug abusers in these positions).

¹⁹² *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

¹⁹³ *American Fed’n of Gov’t Employees v. United States Dep’t of Hous. & Urban Dev.*, 924 F. Supp. 225, 229 (D.D.C. 1996) (noting that an employee’s integrity may be a “valid governmental interest,” but found it not controlling in the context of a housing agency).

¹⁹⁴ Placing these burdens on employers in this context is exactly what Congress intended the disability discrimination statutes to accomplish. See 29 U.S.C. § 720(a)(3)(A) (1999)

VII. A RECOMMENDATION FOR PUBLIC EMPLOYERS

In order to safeguard against liability from many possible legal challenges, state and local entities should cease using drug addiction history as a *per se* disqualification for public safety officer positions. Even if one thinks that such a qualification should be permitted as a predictor of an applicant's future job performance, the current state of the law, especially under the ADA and Rehabilitation Act, provides a substantial risk of liability. In addition, it will be difficult for states and municipalities to argue that a requirement of "no past drug addiction" is an essential qualification when other public employers do not think so. There are many employers who do not have a blanket denial policy for applicants with drug addiction histories. For example, Captain Donald Mates, director of the Montgomery County (Maryland) police personnel said, "We would love to have a zero-past-drug-use policy. Unfortunately, you have to accept some things in people's backgrounds."¹⁹⁵ In fact, some even suggest that it is essential for public employers to accept applicants who have been rehabilitated from drug addiction. Police departments, which have pressure to "put more cops on the streets,"¹⁹⁶ must compete for well-qualified individuals who want to be public safety officers.¹⁹⁷ If the applicant has been rehabilitated and is otherwise a well-qualified individual, the community is actually worse off if the applicant is not hired. Furthermore, it is important to note that the FBI has recently changed its policy on drug addiction history.¹⁹⁸ In 1994, the director of the FBI announced that the Bureau would no longer automatically exclude individuals with histories of drug abuse from consideration for employment¹⁹⁹—a clear indicator that the days of blanket exclusions of rehabilitated drug addicts are numbered.

Other public employers should follow the FBI's example. The bell has tolled for the no-drug-history policies justified by the "essential function" and

("Individuals with disabilities . . . are generally presumed to be capable of engaging in gainful employment."); *see also* *Tehan v. Metro-North Commuter R.R. Co.*, 951 F.2d 511, 515 (2d Cir. 1991) ("An employer obviously may not assume that because a person has a handicap, he or she is unable to function in a given work context.").

¹⁹⁵ Wagner, *supra* note 13.

¹⁹⁶ *See, e.g.,* Vanessa Ho, *Police Shortage Delays Responses: Cities Around State Struggle With Numbers*, THE SEATTLE POST-INTELLIGENCER, Mar. 6, 1998, at C1; Peter Hermann, *City Police Struggling with Shortage*, THE BALTIMORE SUN, Aug. 5, 1998, at 1B.

¹⁹⁷ *See* Hermann, *supra* note 196, at 1B ("Official who changed the policy [with respect to police applicants' drug abuse histories] said they needed to relax standards to compete for quality recruits.").

¹⁹⁸ *See Polygraph Tests*, *supra* note 143, at 46 d10.

¹⁹⁹ *See id.*

"business necessity" defenses. Instead of automatic exclusions from public safety officer positions, clearly lawful means—such as drug testing²⁰⁰—exist to assure that applicants will not pose a safety risk to the public nor undermine the credibility of their office.²⁰¹ The statutory provisions in the Rehabilitation Act and the ADA that enable employers to maintain a drug free workplace provide more than enough protection for any concerns in this area.

What about public employers who choose not to heed this warning and feel that the no-drug-history policy is worth the liability risks? Similar "essential function" disqualifications should then be made for individuals with histories of adultery, compulsive gambling, domestic abuse, and other immoral (and perhaps illegal) acts. This, after all, would be the only way to "purify" the ranks and make credibility impeachment nearly impossible. With such purification, however, one wonders if there would be any "qualified" applicants left. If, however, the rationale for drug history policies is "respect for the law" and maintaining higher moral standards for law enforcement personnel, why do public employers stop at drug addiction history? There must be something more invidious behind no-drug-history policies. Absent equality of treatment among moral offenders, a strong case of disability discrimination could be made against public employers who establish these tenuous qualifications.

Finally, to the chagrin of many, it just may be that American society is beyond the "respect for the law" and "higher moral standard" rationale. The recent presidential impeachment events have shown as much. Although condemned by the House of Representatives, the American people ranked President Clinton the most respected man of 1998—outranking Pope John Paul II.²⁰² This does not mean that Americans respect those who apparently lie under

²⁰⁰ In addition to statutory authority to establish drug testing programs, the Supreme Court has held that such testing of public employees is constitutional. *See* National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989). *But cf.* Chandler v. Miller, 117 S. Ct. 1295 (1997) (illustrating the constitutional limits on drug testing).

Another example of lawful means to achieve the goals of public employers can be found in the FBI's new policy in this area. The FBI policy, while prohibiting blanket exclusions of individuals with drug abuse history, has instituted polygraph test questions about the nature and extent of prior drug use in an attempt to understand "whether an applicant's prior use makes her/him unsuitable for employment, balancing the needs of the FBI to maintain a drug-free workplace . . . [with the] desirability of affording the opportunity of employment to the broadest segment of society." *Polygraph Tests*, *supra* note 143, at 46 d10.

²⁰¹ *Cf.* TECHNICAL ASSISTANCE MANUAL, *supra* note 18, at § 8.7 (stating that periodic drug testing of a rehabilitated drug addict might satisfy the reasonable accommodation provision).

²⁰² A recent article reports:

Eighteen percent of those surveyed named the President as the living person they

oath. It does show, however, that society is more willing to look beyond the sin and make individual determinations about the sinner. Perhaps now we can separate one's ability to do a good job as a public servant from mistakes previously made in his or her private life.²⁰³ The policies of public employers should do the same with regard to individuals with drug addiction histories.

VIII. CONCLUSION

The law as it currently stands raises serious doubts about a state or local entity's ability to disqualify public safety officer applicants based solely on their history of drug addiction. Individual determinations must replace generalities and stereotypes. The language and spirit of the Rehabilitation Act and the ADA establish a presumption that many public employers are breaking the law. Unless these employers stop relying on no-drug-history policies, it is only a matter of time before legal challenges are brought. The strength of arguments that rehabilitated individuals can make, the evolving understanding of drug addiction as a disease, and emerging societal attitudes that undermine the dominant rationale for such policies make it likely that some challenges will succeed. Liability and its accompanying stigma will soon be imposed on institutions whose purpose should be enforcement of the laws and whose limited resources can undoubtedly be better spent.

most looked up to, up 4 points from last year despite his bald-faced lie to the country, a wishy-washy apology and 12 months of sordid headlines about Monica Lewinsky, a stained dress and a cigar. Pope John Paul, No. 2 on the list, was picked by 7%.

Helen Kennedy, *Clinton Fills the Bill: Prez Outpoints the Pope as Most Admired in U.S.*, NEW YORK DAILY NEWS, Jan. 1, 1999, at 3 (also noting that the President's approval rating is at "a career high 73% . . . as the Senate readies to put him on trial"); see also Associated Press, *Clintons Are Most Admired Man, Woman in Annual Poll*, THE WASH. POST, Jan. 2, 1999, at A2.

²⁰³ Compare the recent induction of Lawrence Taylor into the Pro Football Hall of Fame. Taylor was inducted in spite of the fact that he "was suspended once and arrested twice on drug charges, was found guilty of filing false income tax returns and was questioned by a grand jury investigating organized crime." ESPN.com, *Hall Opens Doors for Taylor* (Feb. 2, 1999) <<http://www.espn.go.com/nfl/news/1999/990130/01075745.html>>. Although there was some debate about Taylor's moral fitness, it was determined that "[t]he Hall is about performance on the field" and that "[t]he public understands that by making a judgment on what he did on the field, you're not judging what he did off it." *Id.* (statements of NFL commissioner Paul Tagliabue). In fact, a motion was proposed for a "character clause," which would make a player's character a relevant issue in the selection process, but was "voted down 24-11." Tom Weir, *Taylor Relieved that His Field Feats Matter Most*, USA TODAY, Feb. 1, 1999, at 15C.

